(19,309.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 234.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, PLAINTIFF IN ERROR,

vs.

HENRIETTA MEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, on a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henrietta Meyer, plaintiff, and The Supreme Lodge, Knights of Pythias, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
b of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

c UNITED STATES OF AMERICA,
State of New York, County of Queens, } ss:

I, David L. Van Nostrand, clerk of the supreme court of the State of New York, in and for the county of Queens and clerk of said county of Queens in said State of New York, do hereby certify that the following pages numbered from one to number 92 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Henrietta Meyer, plaintiff, against The Supreme Lodge, Knights of Pythias, defendant, as the same remains of record and on file in my office.

In testimony whereof, I have caused the Seal Queens County. seal of the said court to be hereunto affixed, at Jamaica in the borough — and county of Queens, city and State of New York, this 21st day of April, 1904, in the year of our Lord, one thousand, nine hundred and four, and of the Independence of the said United States of America, the one hundred and twenty-seventh.

D. L. VAN NOSTRAND, *Clerk.*

d Court of Appeals of the State of New York.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant

Case on Appeal.

Laurence G. Goodhart, attorney for defendant-appellant, 17 Park row, New York city.

J. Lawrence Friedman, attorney for plaintiff-respondent, 61–63 Park row, New York city.

1 *Case on Appeal.*

Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

HENRIETTA MEYER, Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant.

Statement under rule 41.

This action was commenced by the service of the summons herein upon the defendant, The Supreme Lodge, Knights of Pythias, on the 30th day of December, 1901, on which day the defendant generally

appeared; the complaint herein was served on the 15th day of January, 1902; judgment was offered for three hundred and fifty-three dollars and seventy-six cents with interest and costs to that date, on the 28th day of February, 1902, and on the 4th of March, 1902, the defendant served its answer.

2 The names of the respective parties in full are:—Henrietta Meyer, plaintiff, and The Supreme Lodge, Knights of Pythias defendant. There has been no charge of parties or attorneys in this action.

The action was tried before Mr. Justice William J. Gaynor and a jury at a trial term of this court in the county of Queens on the 21st of October, 1902. A verdict having been rendered in favor of the plaintiff, judgment was entered herein on the 28th of October, 1902, for the sum of two thousand four hundred and sixty-two dollars and three cents, damages and costs, in the office of the clerk of Queens county, which was subsequently reduced by an order *nunc pro tunc* as of said last mentioned date to two thousand four hundred and forty-two dollars and three cents. The case is annexed to the judgment roll and contains all of the evidence taken upon the trial of this action.

(Same title.)

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated December 30th, 1901.

J. LAWRENCE FRIEDMANN,
Plaintiff's Attorney.

Office and post office address, No. 61–63 Park row, borough of Manhattan, New York city.

3 (Same title.)

SIR: Please to take notice, that the defendant Supreme Lodge, Knights of Pythias, hereby appears in this action, and that I am retained as attorney for it therein, and demand that a copy of the complaint and all papers in this action be served on me at my office, number 17 Park row, borough of Manhattan, city of New York, N. Y.

N. Y., December 30th, 1901.

Yours, &c., LAURENCE G. GOODHART,
Attorney for Defendant.

Office and post office address, 17 Park row, N. Y. city, N. Y.

To J. Lawrence Friedmann, Esq., plaintiff's attorney.

(Same title.)

The plaintiff appearing herein by J. Lawrence Friedmann, her attorney, alleges:

First. That the Supreme Lodge, Knights of Pythias, is and at all the times hereinafter mentioned, was a fraternal mutual benefit corporation, incorporated by acts of Congress and organized and existing under and by virtue of the laws of the United States of America and having during the same times a subordinate branch, known as the Endowment Rank, acting under its authority and subject to its control with branches of the same in the State of New York, and having authority therein to act as a fraternal mutual benefit corporation.

Second. That on or about the 28th day of September, 1894,
4 Emanuel Meyer, plaintiff's intestate, was a member in good standing of the said Endowment Rank, Knights of Pythias, section No. 783, and that said defendant duly issued to said Emanuel Meyer its policy No. 48,028, whereby said defendant, in consideration of the payment by him of the membership fee and of all monthly payments, assessments and dues, as required, undertook, agreed and covenanted to insure the said Emanuel Meyer in the sum of two thousand dollars and duly executed to said Emanuel Meyer its policy No. 48,028; a copy of which policy is hereto annexed marked Exhibit A. That by and in accordance with the terms of said policy, the said defendant duly promised and agreed to pay to Hattie Meyer, the wife of said Emanuel Meyer, the sum of two thousand dollars upon the death of said Emanuel Meyer.

Third. That thereafter, and on or about the 29th day of September, 1900, the said Emanuel Meyer died, and that thereafter and on or about the 20th day of October, 1900, the plaintiff duly gave the defendant due notice and satisfactory proof of death of said Emanuel Meyer and duly performed all the conditions required to be performed by her by and in accordance with the terms of said policy, and the said defendant duly accepted said proofs of the death of said Emanuel Meyer.

Fourth. That the said Emanuel Meyer during his lifetime duly performed and complied with all the conditions, provisions and agreements in said policy to be covenanted and performed by him, and that upon the death of the said Emanuel Meyer and the filing of due notice and proof of said death and acceptance thereof by said defendant, there became and was due to this plaintiff the sum of two thousand dollars, which sum the plaintiff duly demanded of said defendant.

5 Fifth. That the plaintiff herein, Henrietta Meyer, was the wife of the said Emanuel Meyer, at the execution of the aforesaid policy and at the time of his death, described in said policy as "Hattie Meyer."

Wherefore, the plaintiff demands judgment against said defendant for the sum of two thousand ($2,000) dollars with interest from

the 29th day of September, 1900, besides the costs and disbursements of this action.

J. LAWRENCE FRIEDMANN,
Attorney for Plaintiff.

Certificate of Membership.

No. 48028. Amount $2000.

Endowment Rank of the Order of Knights of Pythias.

This certificate witnesseth, that Emanuel Meyer is a member of section No. 2179 of the Endowment Rank, Knights of Pythias of the World, said membership being based upon evidence received that he is a membar in good standing of a subordinate lodge of the order of Knights of Pythias, and upon the declarations, representations and agreements made in his application bearing date of September 6th, 1894, and the statements certified by him therein to the medical examiner, which application is filed in the office of the board of control of the Endowment Rank and made a part of this contract.

In consideration of the payment by said member of the prescribed membership fee and of the payment hereafter to said Endowment Rank of all monthly payments, assessments and dues as re-
6 quired, and the full compliance with all the conditions herein contained and with the laws governing this rank, now in force or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or the board of control of said rank, and shall be in good standing under said laws, the board of control of the Endowment Rank, Knights of Pythias of the World, will pay to Hattie Meyer, his wife, the sum of two thousand dollars out of the endowment fund of the rank in accordance with, and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death, and good standing in the rank at the time of death, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations subscribed to by said member in his application and to the further conditions and agreements hereinafter named; and provided also, that this certificate shall not have been surrendered by said member or cancelled at his request and another certificate issued in accordance with the laws of the rank.

Provided, further, that the beneficiary herein designated shall acquire no interest whatever in the certificate, nor in the endowment fund, until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made. In case of the death of said beneficiary during the lifetime of the member, the benefit accruing under this certificate shall be payable as provided for in article VI, section 1 of the General Laws of the Endowment Rank. And it is un

derstood and agreed that any violation of the within mentioned conditions, or the requirements of the laws now or hereafter in force governing this rank, shall render this certificate and all
7 claims thereunder null and void, and the said Endowment Rank shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World, at Chicago, Illinois, this 20th day of September, 1894.

J. A. HINSLEY,
President Board of Control.

Attest: H. D. STOLKE,
Secretary Board of Control.

I hereby accept this certificate of membership subject to all the conditions therein contained.

Signature of member. EMANUEL MEYER.

Dated at New York this 28th day of September, 1894.

Attest: LOUIS RIEGEL,
Secretary Section 2179.

Verified January 11th, 1902.

(Same title.)

The defendant hereby offers to allow judgment to be taken against it herein by the plaintiff for the sum of $353.76, together with interest from the 29th day of September, 1900, up to and including the date hereof, with costs.

Dated at the city of New York this 20th day of January, 1902.

LAURENCE G. GOODHART,
Attorney for Defendant.

To J. Lawrence Friedmann, Esq., attorney for plaintiff.

8 STATE OF NEW YORK, }
County of New York, } ss.:

Laurence G. Goodhart, being duly sworn, deposes and says:

I. That he is the attorney for the defendant in the above entitled action.

II. That deponent is duly authorized by said defendant to make the foregoing offer of judgment on behalf of said defendant, and has subscribed the same pursuant to such authority.

LAURENCE G. GOODHART.

Sworn to before me this 20th day of January, 1902.

J. M. ROSEBERRY LONG,
Notary Public, New York Co.

(Same title.)

The defendant above named by Laurence G. Goodhart, its attorney, answering the complaint of the plaintiff, respectfully shows to this honorable court:

First. It admits the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "first."

Second. Upon information and belief, it admits that on or about the 28th day of September, 1894, Emanuel Meyer was a member in good standing of said Endowment Rank, Knights of Pythias, and it alleges that on or about said date, the defendant duly issued to said Emanuel Meyer a certain benefit certificate in form
9 similar to the one, copy of which purports to be annexed to the complaint of the plaintiff, but it has no knowledge or information sufficient to form a belief as to whether the instrument, copy of which purports to be annexed to said complaint is the benefit certificate so issued by the defendant to the said Emanuel Meyer on or about said 28th day of September, 1894.

Third. Upon information and belief, it admits so much of the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "third" as alleges "that on or about the 28th day of September, 1900, the said Emanuel Meyer died, and that thereafter and on or about the 20th day of October, 1900, the plaintiff gave the defendant notice and proof of death of said Emanuel Meyer," but it denies each and every of the other allegations in said paragraph or subdivision of the plaintiff's complaint contained.

Fourth. Upon information and belief, it admits that the plaintiff has demanded of the defendant the sum of two thousand ($2,000.00) dollars, but it denies each and every other allegation in the paragraph or subdivision of the plaintiff's complaint marked "fourth" contained, and it denies that the sum of two thousand ($2,000) dollars, or any sum whatsoever became and was due to the plaintiff except as hereinafter alleged.

Fifth. It admits the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "fifth."

Sixth. Upon information and belief, it denies each and every allegation in said complaint contained not heretofore specifically admitted, qualified or modified.

Seventh. Further answering the complaint of the plaintiff,
10 and for a further, separate and distinct defense thereto, the defendant alleges:

1. The defendant reiterates the foregoing with the same force and effect as if here fully and at length set forth.

2. That on or about the 6th day of September, 1894, at the city of New York, in the State of New York, one Emanuel Meyer, mentioned and described in the complaint of the plaintiff, made a certain application in writing upon the form furnished and prescribed by The Supreme Lodge, Knights of Pythias, a fraternal, mutual benefit corporation, incorporated by acts of Congress, under the laws of

the United States, this defendant, to be admitted to and become a member of the Endowment Rank of the order of Knights of Pythias, which is not a corporation but a subordinate branch of the Supreme Lodge, Knights of Pythias, acting under the constitution and by-laws of The Supreme Lodge, Knights of Pythias, this defendant, and under such other laws for its guidance, and for the guidance of its members, as have from time to time been made by the said Supreme Lodge, Knights of Pythias, this defendant.

That in said application, in consideration of the Supreme Lodge, Knights of Pythias, accepting the said Emanuel Meyer as a member of the Endowment Rank of the Knights of Pythias, and the issuance to him of a benefit certificate, the said Emanuel Meyer expressly contracted and agreed as follows:

"I hereby declare that I am a member in good standing of the order of Knights of Pythias, that I am not now a member of the Endowment Rank, Knights of Pythias, have never been rejected as an applicant thereof, and that I am in sound, mental and physical condition; and it is further declared that the foregoing
11 answers and statements, whether written in my own hand or not, together with the answers and statements made, or to be made, to the medical examiner in the continuance of this application are warranted to be full, complete and true, and shall together with all the agreements hereinafter made, form the basis of any certificate of membership issued hereon. It is agreed by myself and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner or in any certificate of health that may be hereafter given, or in the proofs of loss or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the laws of the rank or order, or severing in any manner whatever my membership or connection with the order or the Endowment Rank, said certificate shall be null and void, and all right, title and interest in and to the same as well as the rights of my heirs and beneficiaries to the benefits and privileges accruing to members in good standing of this rank shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material. The person soliciting or taking this application, and also the medical ex-
12 aminer, shall be held to be the agents of the applicant as to all answers and statements in this application.

"It is agreed that if death shall result by self-destruction, whether sane or insane, voluntary or involuntary, or if death is caused or

superinduced by the use of intoxicating liquors, or by the use of narcotics or opiates, or in consequence of a duel, or by the hands of justice, or in violation of, or attempt to violate any criminal law, then the certificate issued upon this application shall be null and void, and all claims on account of such membership shall be forfeited.

"It is agreed that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership, in the Endowment Rank Knights of Pythias, or on any certificate issued, upon this application, unless good and sufficient proof of death is furnished the board of control of the Endowment Rank within one year from date of death of the member, nor shall such action at law be maintained unless suit is commenced within two years from the date of the death of the member.

"It is agreed that membership shall not begin, and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board.

"In addition to the above provisions, I hereby agree that I will be governed, and this contract shall be controlled by all the laws, rules and regulations of the Supreme Lodge, Knights of Pythias of the World and of the board of control, of the Endowment Rank, governing said rank, now in force or that may hereafter from time to time be enacted by said Supreme Lodge or board of control, or submit to the penalties therein contained.

13 "To all of which I willingly and freely subscribe."

And this defendant alleges that said agreements, covenants, conditions and warranties were offered by the said Emanuel Myer to the defendant as a consideration for the contract.

And that the said Emanuel Meyer in further consideration of the promises and of his admission to the Endowment Rank, as aforesaid, and of the issuance of a benefit certificate to him, did expressly contract and agree to be governed and that his contract with the defendant and his beneficiary or beneficiaries should and would be governed, controlled and bound by all the laws, by-laws, rules, usages and regulations of the Supreme Lodge, Knights of Pythias, governing the Endowment Rank then in force, or which might thereafter be enacted by the Supreme Lodge, Knights of Pythias, and by the board of control of the Endowment Rank, governing said rank, and the endowment fund thereof, or submit to the penalties therein contained.

3. That in consideration of the conditions, agreements, covenants and warranties aforesaid on the part of the said Emanuel Meyer, to be by him kept and performed, the Supreme Lodge, Knights of Pythias accepted him as a member of the Endowment Rank aforesaid and issued to him a benefit certificate, as aforesaid.

4. That at the time that said Emanuel Meyer became a member of the Endowment Rank aforesaid and that the defendant issued to

him the benefit certificate aforesaid, the foregoing agreements, covenants, considerations and warranties were in accordance with the terms and by-laws of the defendant then in force and governing said Endowment Rank and the endowment fund thereof, and which
14 form the consideration for and part of the contract between the said Emanuel Meyer and this defendant and which bound the said Emanuel Meyer and his beneficiaries in accordance with the terms of the contract between him and the defendant.

5. That among certain laws, rules and regulations which had been adopted for the government of the members of the Endowment Rank of the Knights of Pythias and to which the said Emanuel Meyer was subject and which he had contracted and agreed to obey as part of the consideration for the payment by the Supreme Lodge Knights of Pythias, through its subordinate the Endowment Rank, to his beneficiary of the sum of two thousand dollars, was the following:

"* * * If the death of any member of the Endowment Rank heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel or at the hands of justice, or in violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at the date of admission to the Endowment Rank, the expectation of life based upon the American Experience Table of Mortality in force at the time of such death to govern.

"Provided that, in the case of members transferred to the fourth class (the present system), from either of the former classes, the date of such transfer shall be taken as the date of admission to the Endowment Rank in computing the amount to be paid as aforesaid
* * *"

15 6. And the defendant alleges upon information and belief that the death of the said Emanuel Meyer resulted from suicide, in that, the said Emanuel Meyer did deliberately kill himself at the city of Buffalo, in the State of New York, on or about the 29th day of September, 1900.

7. That pursuant to the terms of said by-laws and that contract, there became and was due and owing to the plaintiff from the defendant the sum of $353.76, and no other or further sum whatsoever, and that the defendant has offered judgment for the same with interest to the date of the offer of said judgment, and costs of the action up to said date, to wit, the — day of ——

Wherefore, the defendant offers judgment for the sum of $353.76 together with interest from the 29th day of September, 1900, up to and including the — day of ——, 1902, the date upon which offer of judgment was duly made, together with the costs and disbursements of this action which have lawfully accrued to the plaintiff up

to the — day of ——, 1902, the aforesaid date of the said offer of judgment, and the defendant demands that the complaint of the plaintiff be in all other respects dismissed, and that the defendant have all further costs and disbursements of this action.

LAURENCE G. GOODHART,
Attorney for Defendant.

Verified by attorney January 20th, 1902.

16 At a term of the supreme court, held in and for Queens county, at the court house, at Long Island City, Queens county, on the 21st day of October, 1902.

Present: Hon. William J. Gaynor, justice.

J. Lawrence Friedmann, for plaintiff.

Laurence G. Goodhart, for defendant.

(Same title.)

This cause having been called in its regular order on the calendar, on motion of J. Lawrence Friedmann, attorney for the plaintiff, ordered that a jury be called and this cause tried.

Jury duly drawn, called and sworn, or affirmed, and cause tried.

The jury retired in charge of a sworn officer, and subsequently they came into court, and their answer to the following question, "Did the deceased committ suicide," answer, No, the court thereupon directed judgment for the plaintiff for the sum of $2,240.66.

Defendant's counsel moved to set aside the verdict and for a new trial upon all the grounds specified under section 999 of the Code. Motion denied.

Thirty days' stay after service of notice of entry of judgment granted defendant.

5 % allowance to the plaintiff.

[SEAL.] JAMES INGRAM, *Clerk.*

(Same title.)

17 This action having come on regularly for trial before Hon. William J. Gaynor, one of the justices of the supreme court of the State of New York, and a jury, at a trial term of said court, held in the county court house of the county of Queens, on the 21st day of October, 1902, and after hearing all the evidence and allegations on the part of the plaintiff as well as on behalf of the defendant, and a verdict having been duly rendered in favor of the plaintiff and against the defendant for the sum of two thousand two hundred and forty-seven and 66/100 ($2,247.66) dollars and the costs having been duly taxed upon notice at the sum of two hundred and fourteen and 37/100 ($214.37) dollars.

Now, upon motion of J. Lawrence Friedmann, attorney for the plaintiff, it is

Ordered and adjudged, that the above named plaintiff, Henrietta Meyer, recover of the defendant, Supreme Lodge, Knights of Pythias,

the sum of two thousand two hundred and forty-seven and 66 / 100 ($2,247.66) — for which a verdict was rendered in this action, together with the sum of two hundred and fourteen and 37 / 100 ($214.37) dollars costs duly taxed by the clerk of this court making in all the sum of two thousand four hundred sixty-two and 3 / 100 ($2,462.03) dollars, and that the plaintiff have judgment for said amount and execution accordingly against said defendant.

JAMES INGRAM, *Clerk.*

Dated New York, October 28, 1902.

18 At a special term of the New York supreme court, held in and for the county of Kings, in the county court house thereof in said county, on the 12th day of November, 1902.

Present: Hon. Josiah T. Marean, justice.

(Same title.)

Upon reading and filing the annexed affidavit of Laurence G. Goodhart, duly verified the seventh day of November, 1902, and the stipulation in writing between the attorneys for the respective parties hereto, it is

Ordered that the judgment entered in the above entitled action in the office of the clerk of the supreme court of the State of New York, county of Queens, be and the same hereby is *nunc pro tunc* reduced as of the 28th day of October, 1902, from the sum of $2,462.03 to the sum of $2,442.03, and it is further

Ordered that the clerk of the court do mark the same upon the docket of this court accordingly *nunc pro tunc* as of said 28th day of October, 1902, and it is further

Ordered that the foregoing be and it hereby is amended without prejudice to either party of any right to enforce, resist, appeal from, reverse or modify the aforesaid judgment, as thus reduced, or each or any part thereof, and without prejudice to any of the proceedings heretofore had, except such reduction, or which may hereafter be had in the above entitled action.

Enter in Queens county.

J. T. M.
J. S. C.

Granted: November 12th, 1902.

CHARLES T. HARTZHEIM, *Clerk.*

19 At a trial term of the supreme court of the State of New York, held in and for the county of Queens, at the court house thereof, in said county, on the 23rd day of October, 1902.

Present: Hon. William J. Gaynor, justice.

(Same title.)

The issues in this action having come on for trial before Hon. William J. Gaynor, justice, on the twenty-first day of October, 1902, and the court having submitted to the jury for special verdict thereon the question, "Did Emanuel Meyer, the husband of the plaintiff, commit suicide?" and the jury having answered said question "*No,*" *and the defendant having* moved to set aside the verdict aforesaid on the judge's minutes, on the ground that the same is against the evidence, against the weight of evidence and contrary to law, and for a new trial upon the judge's minutes upon the same grounds, it is

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter in Queens county.

W. J. GAYNOR, *J. S. C.*

Granted Oct. 23, 1902.

JAMES INGRAM, *Clerk.*

(Same title.)

SIRS: Please take notice that the defendant, The Supreme
20 Lodge, Knights of Pythias, hereby appeals to the appellate division of the New York supreme court, for the second judicial department, from the judgment entered in the office of the clerk of the county of Queens on the 28th day of October, 1902, in favor of the above named plaintiff and against the above named defendant, for the sum of $2,442.03 damages and costs, entered upon the verdict of a jury at a trial term of this court, held in and for the county of Queens, and from the order denying the defendant's motion for a new trial herein, entered in the office of the clerk of the county of Queens on the 23rd day of October, 1902, and from each and every part of said judgment and of said order.

Dated New York, November 19, 1902.

Yours, &c., LAURENCE G. GOODHART,
Attorney for Defendant.

To J. Lawrence Friedman, Esq., attorney for plaintiff, and James Ingram, Esq., clerk of Queens county.

The Trial.

The issues in this action came on to be tried at a trial term of the supreme court of the State of New York, held on the 21st of October, 1902, before Hon. William J. Gaynor, justice, and a jury at the court house in Queens county. J. Lawrence Friedman, Esq., appeared for the plaintiff, and Laurence G. Goodhart, Esq., for the defendant.

21 DEFENDANT'S COUNSEL: We have the affirmative.

The COURT: The affirmative, is with the defence. They do not question any of the preliminary.

The certificate of membership issued to Emanuel Meyer; the application upon which said benefit certificate was issued; proofs of death submitted in this case; the proof of death made by the physician, Doctor Thornton, which he identified in the commission and the inquisition submitted as part of the proofs of death, and which is duly certified by the county clerk of Erie county, having been taken upon the body of Emanuel Meyer were received in evidence.

The testimony of ARTHUR MCCARTHY, M. D., a witness sworn on behalf of defendant, was read:

Direct examination by Mr. GOODHART:

I am a physician by profession; in the month of September, 1900, I was engaged at the Buffalo General hospital; in the city of Buffalo; my position at the hospital during that month was house physician; I do remember the case of one Emanuel Meyer; I saw him at the hospital; the day and hour I first saw him was September 29th, 1900, at about 8.45 a. m.

Q. How long did he remain at the hospital?

PLAINTIFF'S COUNSEL: I object to this testimony on the ground that it is incompetent and improper, also that it is privileged, that any knowledge obtained by this physician was obtained while he was acting as physician for the deceased, and is not admissible unless expressly waived at the trial, and we hereby state that we do not waive any of the privileges given to us by sections 834 and 836 of the Code, and hereby object to its admissibility.

The objection was sustained and the defendant excepted.

22 From the time he was brought in there until he died I was in and out, I was not constantly present; my assistant, Dr. Thornton, was there continuously, but I was in and out; I was present at the moment of his death; I say that Dr. Thornton was not there, but one or the other was there continuously; from the time he came there to the moment of his death; I entered college in 1896, the University of Buffalo; commenced my medical studies.

The plaintiff admitted that he is an expert, that he is a physician, duly qualified to practice in this State at the city of Buffalo at the time in question.

The WITNESS: I was admitted to practice. I was graduated from the university in April, 1899, and I presume my admission to practice dated from the time of my State board examination which was in the following May; May, 1899; I was licensed by the State board to practice and I have practiced medicine ever since; I state that I

first entered the General hospital on the first of May, 1899; the position I first occupied there was junior surgeon; I state the various positions and the time I occupied them in their order; there are three positions in the plan at the General hospital. A man entering the hospital has an election whether the surgical or medical service. I chose the medical service. By choosing the medical service, it was necessary that I put in my first six months as junior surgeon, which I did; next, at the expiration of six months I was transferred to senior physician; I became senior physician at the General hospital, that would be in November, 1899; I occupied that position until the first day of May, 1900, that is, for six months, and from the first day of May, 1900, to the first of November, 1900, I was house
23 physician; and it was while I was house physician that this man, Emanuel Meyer, was brought there; I was at breakfast when he was brought into the room; I was called from the table; I immediately went to see him; he was put into a private room.

Q. Let us have your complete diagnosis of the case at that time?

PLAINTIFF'S COUNSEL: We renew our objection on all the grounds stated.

The COURT: I have already ruled.

The defendant excepted.

Q. Will you give us the details of his condition?

Objected to; objection sustained and the defendant excepted.

Plaintiff admitted that Dr. Bruso is a duly qualified physician, admitted as such, qualified and licensed to practice medicine in Buffalo, in this State.

The defendant contended that the relationship of physician and patient did not arise between Dr. Bruso and Mr. Meyer, and therefore desired to read the examination.

The COURT: If he did not treat him and he was not his physician, read it all.

C. FRANK BRUSO, M. D., a witness called and sworn on behalf of the defendant testifies as follows:

Direct examination by Mr. GOODHART:

My profession or occupation is physician and surgeon; I commenced to study medicine in 1882, at Lockport. I first com-
24 menced to study medicine at a regular medical institution in the season of 1884–1885, at the medical department of the University of Buffalo; I continued my studies there till I was graduated, March first, 1887; I have not continuously practiced medicine in the city of Buffalo since then; I have continuously practiced medicine ever since; in Buffalo and through the State and in the United States Army. On the 29th of September, 1900, my office was at 380 Main street, Buffalo; that is diagonally across the street from the

Iroquois hotel; I suppose that I remember the 29th of September, 1900. I remember the case of Emanuel Meyer; my first connection with that case was that I think I was called that morning; I was called that morning I think, about 6:50 a. m., by one of the bell boys of the Iroquois hotel; Iimmediately got up. I got up and slowly dressed myself, did not hurry, particularly, and in about ten minutes after that another boy came and wanted me to hurry.

Q. Will you state what the first boy said.

The plaintiff objected to it as hearsay and irrelevant and incompetent; the objection was sustained and the defendant excepted.

In about ten minutes another boy came.

After the second bell boy came, I hastened and went right over; I was only a minute or two behind him; I went up to the fellow's room; I don't remember the number; I don't remember whether the door was open; I think not; it was not locked; I went into the room.

I found a man lying in bed there, suffering intense pain and vomiting.

The plaintiff objected to all except the first part of the answer "found the man in bed lying there."

25 The COURT: Did this doctor treat him?

DEFENDANT'S COUNSEL: He inserted something hyperdermically into the man against his wish which did not help him, I presume.

The objection was sustained and the defendant excepted.

The deposition thus offered in evidence by the defendant and, under the last ruling of the court, thus excluded was as follows:

Deposition Offered and Excluded.

Q. Now, did you have any conversation with the man you found in bed?

A. I did.

Q. Will you state the conversation?

A. I asked him what he had been doing, and he told me it was none of my damned business, that he didn't want me in there, and he wanted me to get out of there. That was about all the conversation I had with him at that time; I looked around the room and over on the dresser; I found, I don't know whether it is a medium or large sized box of "Rough on rats," which he afterwards told me he had taken; the condition of that box was empty; there was not any of the contents left; I say that he told me he had taken it, I asked him why he had taken it, and he said because he wanted to die, and I asked him about his family affairs, if he had a wife and children, and he said yes; I think he said he had a wife and four

children,—that I don't remember distinctly; I knew he told me he had some children; I asked him if he didn't want to get well, and he said "No." He didn't want me to do anything and he wanted me to keep away from him; I then prepared an hyperdermic injection of strychnine and tried to keep up his heart, and stimu-
26 lated him so he wouldn't die in the Hotel Iroquois, because I knew he was going to die; and when I was going to give him that hypodermic, he said "You God damned son of a bitch keep away from me. Didn't I tell you before to keep away." I paid no attention to him and gave him an hypodermic, a sixtieth grain sulphate of strychnine is in an hypodermic injection; he was suffering such intense pain that I afterwards gave him an hypodermic of morphia to make him more comfortable while he lasted; of morphia and atropine.

Q. What, if you know, was the cause of the condition of the man in which you found him?

A. Arsenical poisoning.

Q. On what do you base the statement that he was suffering from arsenical poisoning?

A. He had the evidence of taking some corrosive poison; he also had all the symptoms of arsenical poisoning. I would have based my opinion that he was suffering from arsenical poison upon the symptoms which he exhibited to me at the time that I first saw and examined him, even if he had not told me; combining the symptoms which were exhibited to me by the patient in question with the statements made to me, I am able to say what caused his condition, as I found him. I state that it was cause- by arsenical poisoning; there could not have been anything else that would have brought about the condition in which I found him. My experience with cases of poisoning has been very extensive in hotel work, in hospitals and in institutions I have been connected with. In my experience I have seen probably fifty cases of arsenical poisoning.

The deposition of Dr. William Irving Thornton, whose po-
27 sition in this case is the same as Dr. McCarthy's was excluded and the defendant excepted.

The deposition thus offered to be read is as follows:

Deposition Offered and Excluded.

WILLIAM IRVING THORNTON, M. D., of 152 Jersey street, in the city of Buffalo, county of Erie, and State of New York, by occupation a physician, age 24 years and upwards, being duly and publicly sworn pursuant to the direction hereto annexed upon open commission, and examined on the part of the defendant, doth depose and say as follows:

Direct-examination by Mr. GOODHART:

Q. What is your occupation?

A. Physician.

Q. When did you first commence the study of medicine?
A. The fall of 1896.
Q. Where?
A. University of Buffalo.
Q. How long did you continue your studies?
A. Three years until the spring of 1899.
Q. You were graduated at that time?
A. Yes, sir.
Q. Did you pass the examination of the State medical board?
A. Yes, sir.
Q. And received a license to practice?
A. Yes, sir.
Q. And have continuously practiced since that time as a physician in the city of Buffalo?
A. Yes, sir.
Q. Did you, at any time, occupy any position in the General hospital in the city of Buffalo, county of Erie, and State of New York?
A. Yes, sir.
28 Q. State the dates between which you occupied any position there and what they were?
A. I entered the hospital the last of September, I have forgotten the date—1899.
Q. And what position did you assume there?
A. The first position.
Q. Your first position was what?
A. Junior surgeon.
Q. How long did you continue in that position?
A. That was for a few months, then I was temporary senior surgeon, that was for about two months more.
Q. That brings us up to about what date, as nearly as you can give it?
A. Until nearly the first of the next year.
Q. Then what position, if any, did you occupy there?
A. Senior physician.
Q. That is immediately inferior to the house physician, is it not?
A. I beg your pardon. I became junior surgeon again, because this position that I occupied was simply temporary, then I was junior physician.
Q. When did you become junior physician?
A. I was junior physician first and then occupied temporarily the position of senior surgeon, then became junior physician again until the next spring, the first of next May?
Q. 1900?
A. Yes, sir, then became senior physician.
Q. Up to what time?
A. The following November.
Q. The position of senior physician is immediately inferior to house physician?
A. Yes, sir, sometimes called assistant house physician.

Q. Your next superior being the house physician?
A. Yes, sir.
Q. Who was your house physician in September, 1900?
A. Dr. McCarthy.
29 Q. Do you remember the case of Emanuel Meyer?
A. Yes, sir.
Q. Do you know when he was brought into the hospital?
A. September 29th, 1900.
Q. When did you first see him?
A. I saw him between a quarter of and nine o'clock in the morning of that day.
Q. How did you come to see him?
A. The case was reported at the breakfast table that there was a serious case brought up to one of the rooms. I went up with Dr. McCarthy to see the case.
Q. Did you yourself make an examination as soon as you got to the room?
A. Yes, sir.
Q. You assisted Dr. McCarthy in making the examination?
A. Yes, sir.
Q. State what you found in the case of Emanuel Meyer on this first examination?
A. When I first saw him he was on a bed there. The condition of his extremities was extremely cold.
Q. What was the color of them?
A. They were blue, that is, there was a dusky bluish tinge to the extremities.
Q. The condition of the temperature was what?
A. To all appearances, to the touch, to the feeling, I should say that his temperature was below normal.
Q. I mean the condition of the temperature of the extremities to the touch?
A. Extremely cold.
Q. The color was dusky blue?
A. Yes, sir.
Q. What was the condition of the heart?
A. The heart was very irregular and very weak.
Q. Was the pulse strong or weak?
A. I felt no pulse at all. I attempted to take it and found no pulse whatever.
Q. At the wrist?
A. Yes, sir.
Q. How did you discover the condition of the heart?
A. By a stethoscope.
30 Q. Applied where?
A. Over the area of the heart.
Q. What was the condition of the respiration?
A. The respirations were frequent and I don't remember that

there was anything that struck me at the time, except frequent respirations.

Q. Are you able to say whether they were shallow or deep?

A. I don't think they were either. I don't know just how to answer that, because they didn't strike me either way, simply the frequency that I noticed.

Q. What called it to your attention was the frequency of the respirations?

A. Yes, sir.

Q. Do you know what his temperature was during this first examination?

A. I did not see it taken. It was reported by the nurse that it was sub-normal.

By Mr. WARNER: I move to strike out the answer on the ground that it is hearsay.

Q. What is the normal temperature of a human being?

A. 98 6/10 degrees Fahrenheit.

Q. You mean by that in health?

A. Yes, sir.

Q. What is the definition of sub-normal temperature of the human body?

A. Temperature which is below 98 6/10 degrees taken in the mouth.

Q. Do you know whether Meyer's temperature was taken?

A. I do not.

Q. Was it taken in your presence?

A. Not to my knowledge. That is, I might have been in the room and not have seen it taken.

Q. What other condition besides those you testified to did you find at the first examination?

A. I noticed that there was a cold sweat over his entire body, particularly at the extremities, the hands and the feet.

31 Q. What, if anything, can you say as to the condition as to pain?

A. On questioning, he complained of pain over the epigastric region, although he did not show any evidences of it without questioning—that is, not to writhe to any extent.

Q. He was not writhing?

A. No.

Q. He laid quiet?

A. Yes, sir.

Q. You say upon questioning? Did you have any conversation with Meyer?

A. Yes, sir.

Q. State that conversation?

By Mr. WARNER: Same objection to the conversation as in Doctor McCarthy's testimony.

A. The questions were about the same. I would question him when Dr. McCarthy was out simply to get a more definite statement.

Q. Will you state, as nearly as you can, the conversation between you and Meyer from the time of his entrance to the hospital to his death, giving us, as nearly as you can, your words and his?

By Mr. WARNER: Same objection.

A. I asked him subsequently to Dr. McCarthy's questioning him, if he had taken anything, and he said he had. I asked him what he had taken, and he said a white powder. I asked him what the powder was and he gave me no definite answer.

Q. Did he say anything, and if so what were the words which he used in answering that question?

By Mr. WARNER: Same objection.

A. He said he took a powder that he had found in one of the drawers in the hotel did up in a paper.

Q. That is all the reply that he gave you?

A. Yes, sir.

Q. Did you have any further conversation with him?

A. I asked him if he was having any pain, and he said
32 "Yes," and I asked him where, and he made a movement with his hand in the region of the stomach.

Q. Is that all the conversation you had with him from the time of his entrance to the hospital to the time of his death?

A. I asked him where he lived and he gave an address of fifty something West 112th street, New York city.

Q. Is that all the conversation?

A. I asked him why he had taken this powder.

By Mr. WARNER: Same objection to all the conversation.

A. And he said that he was in hard luck, that he had lost money in the races and in gambling. That is the entire statement, as I remember it. I believe that I requestioned him, and got about the same as that over again.

Q. Can you state what his mental condition was during this questioning and answering?

A. The mental condition was clear.

By Mr. WARNER: I object to that as calling for the conclusion of the witness.

Q. Upon what did you base your answer that the mental condition was clear?

A. His statements were ready without any hesitation, the words were clear and his statement was perfectly connected.

Q. Now, Doctor, will you state what was done for Meyer by yourself at the time you completed this first examination upon his entrance to the hospital.

A. The ordering was done by Dr. McCarthy. I did not order anything directly myself.

Q. You heard Dr. McCarthy's testimony on that point?

A. Yes, sir.

Q. Is it correct to your knowledge?

A. Yes, sir.

Q. Did you see the orders complied with?

33 A. I saw most of them at that time. That is, I cannot state definitely whether I saw all the hypodermics given.

Q. Now, come down to the statement of Dr. McCarthy that hydrated sesquioxide of iron was administered. Who administered it?

A. Dr. McCarthy with my assistance.

Q. How much hydrated sesquioxide of iron was given first by yourself and Dr. McCarthy?

A. I cannot state the definite amount.

Q. How near can you approximate it?

A. Why, of the solution I know there was at least a pint, which was placed in a pint pitcher, and I think a large proportion of that was given.

Q. You think the larger part of the pint was given?

A. Yes, sir, there was some given by mouth afterwards.

Q. Did you see that part which was given?

A. Yes, sir.

Q. And you assisted him in giving the first dose?

A. Yes, sir.

Q. You have heard the testimony of Dr. McCarthy as to the cleansing of the stomach and the vomiting from the stomach. Is that correct to your recollection?

A. Yes, sir.

Q. And you assisted in that operation?

A. Yes, sir.

Q. How often did you see Meyer from that time to his death?

A. I cannot recall the number of times.

Q. You were in and out continuously?

A. Yes, sir.

Q. Will you state the progress of Meyer's case from the time of his first treatment to his death from your personal knowledge?

A. The condition improved slightly after the stimulation which he had had.

34 Q. And which Dr. McCarthy has testified to?

A. Yes, sir.

Q. And which is correct?

A. Yes, sir.

It is stipulated that all objections to the questions and motions to strike out the answers in Dr. McCarthy's testimony shall apply to the same or similar questions and answers in Dr. Thornton's testimony.

Q. State now the progress of Meyer's case from your personal knowledge up to the time of his death from the completion of this first treatment?

A. The improvement, as I stated, was very slight, and it lasted, I should think, possibly half or three-quarters of an hour, and after that his general condition began to fail, and he lapsed into unconsciousness and died about 10.20.

Q. The immediate cause of his death being?

A. Heart failure.

Q. Doctor, you have heard the testimony of Dr. McCarthy, and you recollect your own as to corresponding symptoms exhibited by Meyer. Can you state whether Meyer died from natural or unnatural causes?

A. Unnatural causes.

Q. Was his death caused by physical injury?

A. No, sir.

Q. Can you say what other class of unnatural causes caused the death of Emanuel Meyer?

A. Why, some poison taken into the system.

Q. From your personal knowledge of Meyer's case, by which I mean the symptoms exhibited at the time of your first examination and the progress of his case to his death, can you state what poison caused his death?

A. I cannot state positively.

Q. What poisons could have produced the conditions present in Meyer's case, from your personal knowledge of the same?

A. The poison that would come to me first would be arsenic.

35 Q. Would arsenic account for all you know of Meyer's case?

A. Yes, sir.

Q. Would anything else which you know account for every condition present in Meyer's case?

A. Not that I know.

Q. You have stated the immediate cause of Meyer's death to be heart failure. Can you state what was the actual condition of the heart which was the immediate cause of death?

A. It was degeneration apparently of the heart muscle, myocarditis.

Q. Could myocarditis be the result of the administration of arsenic?

A. It could.

Q. Is it not true that cold cyanosed extremities is a characteristic of arsenical poisoning?

A. I can't say it is characteristic of it. It is one of the symptoms.

Q. In cases of arsenical poisoning, what is the mental condition?

A. It is generally clear.

Q. You have heard Dr. McCarthy testify, and you have said that

Mr. Meyer vomited part of the contents of his stomach. Did you observe the nature of that?

A. Only in a rough way. Simply noted it was a fluid, dark colored vomit.

Q. Is that a symptom of arsenical poisoning?

A. Do you mean the vomiting or the character of it?

Q. Vomiting and the character of it?

A. I don't think you can say the character is; the vomiting is.

Q. Is there any particular character to the vomit in arsenical poisoning—one exclusive of all others?

A. I think not.

Q. But vomiting is?

A. Yes, sir.

Q. Was there retching present?

A. The ordinary retching of vomiting was present.

Q. What, if anything, can you say as to the stool?

A. I didn't see the stools personally. I only know from hearsay.

36 Q. Did you see Meyer after he died?

A. Shortly after he died.

Q. Did you make any examination of the body at that time?

A. No, sir, except to see definitely if he was dead.

Q. And he was dead?

A. Yes, sir.

Q. Now, Doctor, having in mind all the aspects of the case as you know it, how do you account for his death?

By Mr. WARNER: Objected to as incompetent and immaterial.

Q. What caused his death, if you know?

A. The degeneration of the heart muscle which caused the heart failure?

Q. That was the immediate cause of death?

A. Yes.

Q. Will you tell us, if you can, what was the contributing cause of death?

A. In my belief, it was arsenic.

Q. What is that belief founded upon?

A. On the symptoms which the man presented when he entered the hospital, on the course of the disease, or the condition, on the sequence of symptoms, and on the man's statements that he made to me on questioning him what he took.

Q. Do you include in that, the manner in which he died?

A. Yes, sir.

Q. You didn't have anything to do with the preparation of the certificate of death?

A. No, sir.

Q. Was Meyer brought to the hospital in an ambulance?

A. Yes.

Q. Did you have any conversation with the ambulance physician who brought him?

A. No.

Q. I show you a paper partly written and partly printed. Will you state, if you know, in whose handwriting the written parts of that is written, down to the words "attending physi-
37 cian"?

A. Yes, sir.

Q. Will you state in whose handwriting that is?

A. In mine.

Q. Is that your signature above the words "attending physician"?

A. Yes, sir.

Q. And did you swear to the contents of this document?

A. Yes, sir.

Q. As therein appears and before the notary public whose name is thereto subscribed?

A. Yes, sir.

By Mr. GOODHART: I offer in evidence the certificate of the physician and undertaker.

By Mr. WARNER: I object to it as being incompetent and immaterial.

Admitted in evidence and marked Defendant's Exhibit 3, June 20th, 1902.

Cross-examination of WILLIAM IRVING THORNTON by Mr. WARNER:

Q. Dr. Thornton, are you able to state positively, excluding from your mind statements made to you by the man Meyer, whether or not the man died from arsenical poisoning?

A. No, not positively.

Q. Was it not a fact, Doctor, that Meyer's myocarditis, together with acute indigestion, could have produced the symptoms shown by Meyer?

A. You mean by that the entire symptoms?

Q. All the symptoms, excluding any statements made to you by him?

A. I think they could not.

Q. The pulsation and the temperature and the cyanosed condition could have been caused by myocarditis, could they not?

A. You mean the pulsation of the heart—the heart beat?

38 Q. I understand you were not able to get his wrist pulse?

A. There are different forms of pulsation—pulsation of the neck.

Q. You took it at the heart. Those symptoms could have been produced by myocarditis, could they not?

A. The pulsations could, that is, the lack of pulsation.

Q. And the cyanose condition?

A. Yes, sir.

Q. The purging, diarrhœa and the other symptoms could have been induced by acute indigestion, could they not, Doctor?

A. The first two I should say, and as to the others no. There was an exception I took to your first statement.

Q. What symptoms were shown by the man Meyer, which could not possibly have been produced by myocarditis, coupled with acute indigestion?

A. I think the icy extremities could not have been produced by any such cause.

Q. Is it not a fact that the cyanose condition, connected with the icy extremities, are symptoms of myocarditis?

A. I don't think that the extent of that icy condition could be present in myocarditis uncomplicated by arsenical poisoning.

Q. If a person has myocarditis, the heart is not able to send the blood to all the parts of the body?

A. If it has not compensated.

Q. Well, when there is myocarditis, the heart is not as competent as it would be if he did not have myocarditis?

A. You might have a competent heart with myocarditis.

Q. Be able to send the blood to all parts of the body in myocarditis?

A. Yes, sir, the heart might compensate.

Q. Well, Doctor, if a person has myocarditis, and a very strong case of it, or say that he is weak, just as you want to put it the heart does not compensate at all, the blood would not be sent to the extremities of the body, would it?

A. Not properly sent.

39 Q. And if the blood was not properly sent to the extremities the extremities would be cold, would they not? I don't necessarily mean to the freezing point?

A. They would be cold.

Q. And if the heart was very weak in a case of myocarditis, the extremities might have been as cold as the extremities of this man Meyer?

A. I think not.

Q. Did you take the temperature of the extremities of Meyer?

A. I did not.

Q. You don't know how cold they were, do you?

A. How do you mean take the temperature of the extremities?

Q. You say they were pretty cold?

A. I felt by the sense of feeling with my hand.

Q. And what was the temperature?

A. I don't know.

Q. Do you mean to say then, Doctor, not knowing how cold his extremities were, that there could not be a case of myocarditis where the extremities were as cold as they were in the man Meyer?

A. I think not.

Q. Do you mean to state that?

A. In my experience I have never seen as cold extremities in a

heart that did not compensate from myocarditis. I never saw as cold extremities as I did in this case.

Q. And that is what you base your opinion on in this case. Because you never saw such cold extremities?

A. Yes.

Q. On what else do you base your conclusion?

A. Authorities state this same proposition, that extremely cold extremities come from case of poisoning, from arsenic.

Q. Upon what do you base your conclusion that the extremities could not be as cold in a case of myocarditis as they could be in a case of arsenical poisoning?

40 A. Because, simply from my experience, I base my own statement from the experience that I have had. I have seen a number of cases of myocarditis, of heart failure, I have noticed the cold extremities, and in cases of myocarditis I never noticed the extreme cold I did in this case.

Q. And you cannot possibly conceive of any case of myocarditis where the extremities could be as cold as the extremities of this man Meyer?

A. No, sir, I could not.

Q. The only difference in the symptoms between those exhibited by the man Meyer, and the symptoms which would be exhibited by a person suffering from myocarditis, coupled with acute indigestion, were extreme cold feet? Is that correct?

A. Which form of myocarditis do you refer to?

Q. Conceive any possible severe form that would cause the cyanose condition and the weak pulsation?

A. Possibly the severe form of indigestion and acute myocarditis might produce all the symptoms, excepting the icy cold extremities and the clear mentality.

Q. And this could not possibly be—these cold extremities—from the myocarditis?

A. Not to my belief.

Redirect-examination by Mr. GOODHART:

Q. In answer to the question as to the cold conditions of the extremities, to what time in the history of Meyer's case do you refer?

A. I noticed this condition immediately upon my first examination.

Q. Which was at least an hour and a half before he died?

A. Yes, sir.

WILLIAM IRVING THORNTON, M. D.

End of deposition offered and excluded.

41 MARY HYLAND a witness sworn and examined on behalf of the defendant testified as follows:

By Mr. GOODHART:

My business or occupation is that of sick nurse; in the month of September, 1900, my occupation was then sick nurse; in that month I was engaged at the Buffalo General hospital; I remember the 29th day of September 1900; I remember the case of one Emanuel Meyer who was brought to the Buffalo General hospital on that day; the nurse in charge was Miss Robertson; I attended to the Meyer case; I think Dr. McCarthy was the physician in charge of the case; I received orders from Dr. McCarthy regarding the treatment to be given to Meyer; I had a conversation with the man Meyer. I would not want to swear to the conversation. As nearly as I recall the conversation I had with Meyer I asked him what he took and he said a powder; that is all I know; that is the conversation; I positively swear to that.

JOHN R. KENNY, a witness sworn and examined on behalf of the defendant testified as follows:

Direct-examination by Mr. GOODHART:

In September, 1900, I was one of the coroners in and for the county of Erie and State of New York; at that time I was resident at 156 Clinton street, Buffalo; I remember the case of Emanuel Meyer who died in Buffalo on September 29, 1900, from this record.

42 I was the coroner who held the inquest on the body of Emanuel Meyer. I cannot state as a result of my inquest what was the cause of Emanuel Meyer's death.

Q. If the inquest says that the cause of Emanuel Meyer's death was suicide from arsenical poisoning, that the contributing cause of death was myocarditis, and that he was found dying, was that the result of your inquisition?

Objected to as incompetent, irrelevant and immaterial and calling for a conclusion, and also upon the ground that it is not shown that this witness had any knowledge, not having qualified as an expert; the objection was sustained; and the defendant excepted.

Q. Did you see that certificate?

Same objection, ruling and exception.

That is how I came to make that inquisition. I conducted no examination on the body of Emanuel Meyer; no autopsy was performed by my orders; it is not necessary. I say it is not necessary to perform an autopsy because he was taken to the hospital and attended by a regular physician and he gave the cause of death, and that satisfied me; that is all I know about the case.

Cross-examination:

An autopsy had not been performed upon the body. All I know about the history of the case is that certificate of the doctor which I O. K'd, which is on file.

Re-direct examination by Mr. GOODHART:

This certificate I spoke of was a written death certificate;
43 in regular form; I am acquainted with the regular form provided by law; I occupied the position of coroner for thirteen years; I saw the body of Emanual Meyer at Brady's undertaking establishment; I did not know it to be the body of the man. The body was laying in the coffin; I saw the face; that is all I saw; I did not strip the body: I saw that he lay in the coffin, the lid was off; he was completely dressed for burial; he had pants on and a shirt; he was covered from feet to neck; he had his pants, shirt on, etc. By "and so forth" I mean he had clothes on for burial; I saw his hands and his face; that is all I saw.

LAURENCE G. GOODHART, a witness sworn on behalf of the defendant, testified as follows:

I received the proofs of death in this case. I received them from the general counsel of the order accompanied by a letter, which I will offer in evidence, containing certain proofs of death in the case of Emanuel Meyer.

The COURT: I exclude the letter.

The secretary or whoever received it is not here. They are all in Chicago. These papers, however, were sent to me as original papers in connection with the case.

Q. What proofs of death were submitted to the Supreme Lodge of the Knights of Pythias and its board of control in the case of Emanuel Meyer?

The COURT: I exclude it unless it was submitted to you. You have already said they were sent to you by a letter from Chicago.

44 The WITNESS: That is true.

The COURT: I have to exclude it, therefore, you do not know.

Q. What, if you know, is the custom with respect to the furnishing of proofs of death to the Supreme Lodge, Knights of Pythias?

Objected to; objection sustained; and the defendant excepted.

The COURT: There is no custom about it; the contract and the law requires proofs of deaths to be submitted.

To this ruling the defendant excepted.

HENRIETTA MEYER, the plaintiff, sworn and examined as a witness on behalf of the defendant, testified as follows:

By Mr. GOODHART:

I am the plaintiff in this action. I did not send the proofs of my husband's death to the lodge. I presented no proofs of my husband's death to the lodge. I don't know anything about it. I didn't send them; I don't know whether I signed any proofs of death, I think I did. I sent on the blank proofs of death to the lodge. I guess I received one blank when I asked for blank proofs of death; one I think; they did not send it to me; a man gave it to me; Mr. Rothschild gave me the blank one night; I guess he is connected with the Knights of Pythias; I know he was the secretary of my husband's section; I don't remember speaking with Mr. Rothschild about filling up the proofs of death; he gave me a
45 blank; that is all he said and went away; I don't remember, saying anything; he gave me a blank; he called to my house and gave me a blank; he said that was to be filled, I guess, that is all; I don't remember his conversation otherwise; I can't recall anything further that he said; what I did with that blank proof of death, I wrote and filled it up, I guess, I don't know that I wrote it all; I did not give it back to him; when it was all written up; I gave it to somebody. This was sent to the lodge, I guess, I don't know. I don't think I sent it to the lodge.

By Mr. FRIEDMAN:

That is the same paper Mr. Rothschild gave me. I wrote that; that is the paper he gave me; that is what I filled out.

By Mr. GOODHART:

That is the only paper I had. Whether I ever had any conversation with Mr. Rothschild concerning the necessary proofs of death outside of this particular piece of paper, he didn't seem to have nothing to do he didn't tell me nothing; I never spoke to him on the subject of the names of these physicians who took care of my husband in Buffalo; he never spoke to me, he only sent for me and offered me $350.

The by-laws of the organization governing the contract at the time of the admission of Mr. Meyer were received in evidence.

By Mr. GOODHART:

I don't know, I couldn't remember whether this book which my attorney has handed to you was given to him by me.

The defendant proposed to read parts of the physician's
46 proof of death to the jury, as part of the proofs of loss saying that in her proof, she gives the place of the man's death only. To prove the death outside of it, defendant read from the testimony of Dr. Thornton: "Q. I show you a paper partly written and partly

printed. Will you state if you know in whose handwriting the written part of that is written down to the words attending physician? A. Yes, sir. Q. Will you state in whose handwriting that is? A. In mine. Q. Is that your signature above the words 'attending physician'? A. Yes, sir. Q. And did you swear to the contents of this document? A. Yes, sir. Q. As therein appears and before the notary public whose name is thereto subscribed? A. Yes, sir.

The certificate of the physician was offered in evidence. It was excluded and the defendant excepted.

The certificate of the undertaker was received in evidence.

LEOPOLD BERGER, a witness sworn on behalf of the defendant, testified as follows:

By Mr. GOODHART:

I knew the late Emanuel Meyer of the city of New York; I am engaged in the neckwear business; he was occupied with me in business fifteen years; as a salesman; in the year 1900 he traveled for me in different parts of New York State; he took Buffalo; I first heard of Emanuel Meyer's death on Saturday morning; I had a telegram from the hotel; the last communication I had from Emanuel Meyer before that was that I received orders from Buffalo which he took
47 there; I don't know the dates of these orders; the last order was dated two days before September 29th, 1900, the day he died, which I think was Saturday; the orders were dated; he took about eleven orders in one day in Buffalo: I close my place of business on Saturday at five o'clock. I did not receive any communication of Mr. Meyer's death the same day that he died or the next day.

I did not learn that any communication had been sent to me on the day that he died, or the day before he died from him; I have never heard of any such communication; I do not know whether Mr. Meyer just about the time that he died requested any money of me to be sent to him at Buffalo.

The plaintiff rested.

The defendant moved to dismiss the complaint upon the ground that the plaintiff had not shown compliance with the terms of the contract by showing she had put in proper and complete proofs of death, as provided by the by-laws and the contract.

The COURT: At the opening of the case you claimed the affirmative and admitted that all the conditions precedent had been complied with, therefore, the plaintiff did not need to put in any such proof.

The motion was denied; to which the defendant excepted.

Both sides having summed up, the court charged the jury as follows:

GENTLEMEN: I just submit to you the one question, whether this deceased committed suicide. The burden is on the defendant to establish that. They have pleaded as a defense that he committed suicide. They have to prove it. Counsel says the
48 proof of it is what this nurse says in this deposition the deceased said to her "I took a powder." He says that she said, "And it produced the symptoms which I now have." I did not hear that part read, and I do not think it was read.

DEFENDANT'S COUNSEL: I apologize to the court for that, I made a mistake.

The COURT: Well, the best way is to get just what facts are in the case and try it that way. You are to decide from what evidence there is in here, whether the defendant has established that the deceased committed suicide. You will answer the question: Did the deceased commit suicide either yes or no. That must be established by a fair preponderance of evidence. I have excluded the evidence of the physicians and surgeons who attended him, because the law excludes it. When you employ a doctor he may not come into court and disclose what he learns in the treatment. It is not permitted. Neither may a lawyer or a priest disclose what they learn. That is well established in our law. So you must confine yourselves not to any suggestion or imagination, but to the proof that is here, whether he committed suicide.

Just answer that question.

DEFENDANT'S COUNSEL: I except to so much of your honor's charge as states that the physicians' and surgeons' testimony is excluded on the ground that they attended the deceased professionally.

The COURT: Yes.

49 *Certificate of Membership.*

No. 48028. Amount, $2,000.

Endowment Rank of the order of Knights of Pythias.

This certificate witnesseth, that Emanuel Meyer is a member of section No. 2179 of the Endowment Rank Knights of Pythias of the World, said membership being based upon evidence received that he is a member in good standing of a subordinate lodge of the order of Knights of Pythias, and upon the declarations, representations and agreements made in his application bearing date of September 6, 1894, and the statements certified by him therein to the medical examiner, which application is filed in the office of the board of control of the Endowment Rank and made a part of this contract.

In consideration of the payment by said member of the prescribed membership fee and of the payment hereafter to said Endowment Rank of all monthly payments, assessments and dues as required, and the full compliance with all the conditions herein contained and with the laws governing this rank, now in force or that may

hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or the board of control of said rank, and shall be in good standing under said laws, the board of control of the Endowment Rank, Knights of Pythias of the World, will pay to Hattie Meyer, his wife, the sum of two thousand dollars out of the endowment fund of the rank in accordance with, and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death, and good standing in the rank at time of death, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations subscribed to by said
50 member in his application and to the further conditions and agreements hereinafter named; and provided, also, that this certificate shall not have been surrendered by said member or cancelled at his request and another certificate issued in accordance with the laws of the rank.

Provided, further, that the beneficiary herein designated shall acquire no interest whatever in the certificate, nor in the endowment fund, until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made. In case of the death of said beneficiary during the lifetime of the member, the benefit accruing under this certificate shall be payable as provided for in article VI, section I of the General Laws of the Endowment Rank. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws now or hereafter in force governing this rank, shall render this certificate and all claims thereunder null and void, and the said Endowment Rank shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World, at Chicago, Illinois, this 20th day of September, 1894.

[CUT.] J. A. HINSEY,
President Board of Control.

Attest: H. B. STOLTE,
Secretary Board of Control.

51 I hereby accept this certificate of membership subject to all the conditions therein contained.

Signature of member: EMANUEL MEYER.

[SEAL.] Dated at New York, this 28th day of September, 1894.

Attest: LOUIS RIEGEL,
Sec'y Section No. 2179, *Endowment Rank, K. of P.*

Application for Membership in the Endowment Rank, Knights of Pythias of the World.

To the board of control, Endowment Rank, Knights of Pythias:

The undersigned, makes the following application for membership in section No. 2179 of the Endowment Rank Knights of Pythias.

I hereby warrant that I am a member of Independence Lodge No. 361, Knights of Pythias of the grand jurisdiction of State of N. Y.; that dues and other charges against me in said lodge are paid to Oct. 1st, 1894, and that all questions herein are truthfully and completely answered.

1. A. Give your name in full. A. Emanuel Meyer.

B. Post-office address. B. 1695 Lexington Av.

C. Present and previous occupation. State clearly the kind of business. C. Present, salesman; previous, salesman neckwear.

D. Are you married, single or widower? D. Married.

52 2. Give the place and date of your birth and present age at nearest birthday. Born at N. Y. city, State of N. Y., on the 25th day of April, 1862. Age nearest birthday 32.

4. A. Have you ever been a member of the Endowment Rank? If so, give section number, and cause of the termination of your membership. A. No.

B. Have you now any life insurance or endowment? B. No.

C. If so, in what order or company? Give the names and amount in each. C.

D. Have you ever applied to any society, company or agent for insurance without receiving a certificate or policy? If so, state full particulars. D. No.

5. What amount of endowment do you desire, $1,000, $2,000, $3,000, $4,000 or $5,000? $2,000.

6. A. To whom do you want the endowment paid? Give name or names in full and post-office address. A. Hattie Meyer, 1695 Lexington Av.

B. State the relationship of the person or persons to you. B. Wife.

Persons related — or dependent upon the applicant for support can be named only. See article VI, sec. 1, General Laws.)

Read carefully the following declaration and agreement, and observe its import:

I hereby declare that I am a member in good standing of the order of Knights of Pythias, that I am not now a member of the Endowment Rank Knights of Pythias, have never been rejected as an applicant thereof, and that I am in sound, mental, and physical condition; and it is further declared that the foregoing answers and statements, whether written in my own hand or not, to-

53 gether with the answers and statements made, or to be made, to the medical examiner in the continuance of this applica-

tion are warranted to be full, complete and true, and shall, together with all the agreements hereinafter made, form the basis of any certificate of membership issued hereon. It is agreed by myself and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner or in any certificate of health that may be hereafter given, or in the proofs of loss or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the laws of the rank or order, or severing in any manner whatever my membership or connection with the order or the Endowmennt Rank, said certificate shall be null and void, and all right, title and interest in and to the same, as well as the rights of my heirs and beneficiaries to the benefits and privileges accruing to members in good standing of this rank shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material. The person soliciting or taking this application and also the medical examiner, shall be held to be the agents of the applicant as to all answers and statements in this application.

54 It is agreed that if death shall result by self-destruction, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors, or by the use of narcotics or opiates, or in consequence of a duel, or by the hands of justice, or in violation of, or attempt to violate any criminal law, then the certificate issued upon this application shall be null and void, and all claims on account of such membership shall be forfeited.

It is agreed that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership, in the Endowment Rank Knights of Pythias, or on any certificate issued, upon this application, unless good and sufficient proof of death is furnished the board of control of the Endowment Rank within one year from date of death of the member, nor shall such action at law be maintained unless suit is commenced within two years from the date of the death of the member.

It is agreed that membership shall not begin, and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board.

In addition to the above provisions, I hereby agree that I will be governed, and this contract shall be controlled by all the laws, rules

and regulations of the Supreme Lodge Knights of Pythias of the World, and of the board of control, of the Endowment Rank governing said rank, now in force or that may hereafter from time to time be enacted by said Supreme Lodge or board of control, or submit to the penalties therein contained.

55 To all of which I willingly and freely subscribe.
Dated at New York, this, the 6th day of Sept., 1894.

EMANUEL MEYER, *Applicant.*

Witness:
LOUIS RIEGEL,
[SEAL.] *Sec'y Sec. No.* 2179.

Applicant must sign in person and with first name in full.

NOTE.—Every blank on this application must be properly filled and all questions on the medical examiner's form and in the examination, must be answered before sending the application to the board of control.

Physician's Proof of Death.

The physician making certificate of death will please observe the following abstract of the contract under which deceased held membership.

"I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

Endowment Rank, Knights of Pythias. Physician's certificate of death. All answers must be full and explicit and in the physician's own handwriting.

56 STATE OF NEW YORK, } ss:
County of Erie, }

Wm. I. Thornton, M. D., of Buffalo, N. Y., residing at 100 High street, being duly sworn, deposes and says that he is a physician by profession, of 1½ years' practice, graduated from Buffalo Medical College, of Buffalo, N. Y., that, as such physician he attended in the last illness of Emanuel Meyer (hereinafter called deceased) who died at Buffalo General Hospital on the 29th day of September, 1900, that the answers herein given contain true and full information concerning the subject matter of all questions asked:

To prevent delay in the consideration of this death-proof, please do not use such indefinite terms as "heart-failure," "general debility," "dropsy," "old age," etc.

1. Have you read the conditions of the contract printed above? Yes.

2. A. What was apparent age of deceased? A 36 years.
B How long have you known him? B About two hours.
C How long medical attendant or adviser? C About 2 hours.

3. What was occupation of deceased during time you knew him and up to date of death? Travelling salesman.

4. Was deceased engaged in any way in the sale or manufacture of alcoholic liquors? Not known.

5. A What was disease during last illness? A A condition simulating arsenic poisoning.
B How long in your opinion, did deceased suffer from this disease? B About 10 hours.
57 C What was the *immediate* cause of death? C From a condition simulating arsenic poisoning.

6. For how long a time was deceased confined to the house or prevented from attending business? Ten hours.

7. A When were you first consulted by the deceased, or by any relative or friend for the affection which either directly or indirectly caused death? A Sept. 29th, 1900.
B Give dates of your first and last visit? B Same as above.

8. Was there any special cause, direct or indirect, for the death, in the habits, occupation or residence of deceased? Not known.

9. A Did deceased use narcotics or alcoholic beverages of any kind? A Not known.
B If so, to what extent? B.
C Did such usage, in your opinion, hasten or cause death, directly or indirectly? C.

10. Was death caused by suicide or violence, or from other than natural causes? If so, state particulars. Suicide. Patient said he was in trouble and took a white powder which preceded the above condition which led to his death.

11. Was there a post-mortem examination of deceased; if so, by whom and with what result?

12. Did any other physician attend deceased, either before or during last illness? If so, give the name and address of each? No.

13. For what disease did you treat or advise deceased prior to his last illness? Give dates, duration and result of each. None.

58 14. Had deceased any other disease, acute or chronic, or any injury or infirmity; if so, state whether it hastened death? Not known.

15. Have any of deceased's relatives been afflicted with or died of insanity, tuberculosis, consumption, or any hereditary disease? State fully. Not known.

16. Have you known or heard of deceased applying for insurance

to any company or association upon which a policy or certificate was not issued? If so, when and what company or association? No.

WM. I. THORNTON,
Attending Physician.

Subscribed and sworn to before me this 8th day of January, 1901.

[L. S.] RANWICK R. ROSS,
Notary Public, Erie Co., N. Y.

STATE OF NEW YORK, }
County of Erie, } ss:

I, Carl J. Seymour, dep. clerk of the county court, being a court of record of said county, do hereby certify that Renwick R. [SEAL.] Ross before whom the above affidavit was made, was, at *at* the time of the same, a notary public in and for said county, duly authorized to administer oaths, and I verily believe his signature to be genuine.

Witness my hand and official seal this 9th day of January, 1901.

CARL J. SEYMOUR, *Dep. Clerk.*

59 *Certificate of Undertaker.*

Edward L. Brady, an undertaker, residing at Buffalo, N. Y., being duly sworn, deposes and says that the following answers by him made and subscribed to, are true and full to the best of his knowledge and belief.

1. Name and apparent age of deceased? Emanuel Meyer, about 36 years.

2. Residence and occupation of deceased? New York city. Salesman.

3. Date and place of death? Sept. 29th, 1900; 100 High street, Buffalo.

4. Did you attend the funeral and interment of deceased; when and where? I sent the body to New York city for burial.

5. Do you know the body interred to be that of the person named by you as the deceased? Never knew him during his life, but believe it was Emanuel Meyer.

EDWARD L. BRADY.

Subscribed and sworn to before me this 9th day of January, 1901.

[L. S.] JOHN F. SPACK,
Notary Public.

Certificate of notaryship by clerk of same county court as above.
Endowment Rank, Knights of Pythias.
Certificate and claim of beneficiaries.
All answers must be full and explicit.

60 When beneficiaries are minors, or non-residents of the United States or Canada, this certificate and claim must be executed by their legal representative, either guardian or attorney, and certificate from proper officer, showing their appointment as such, must invariably be furnished.

STATE OF NEW YORK, }
County of New York, } ss:

The undersigned, beneficiary of certificate number 48028, for $2000, issued by the Endowment Rank, Knights of Pythias to the late Emanuel Meyer, a member of section No. 783 of said Endowment Rank, being duly sworn says that she is the *bona fide* beneficiary of the endowment accruing under said certificate, and declares that the answers given to the following questions are correct:

1. State the name in full, age, relationship, and residence of each beneficiary? Hattie Meyer, 35, wife.

2. Name of deceased in full? Emanuel Meyer.

3. Residence of deceased since above certificate was issued? 53 W. 112th St.

In stating occupation, merchant, clerk and similar terms must not be used.

4. A. Occupation of deceased at date of certificate? A. Traveling salesman.

B. Occupation of deceased March 1, 1894? B. Traveling salesman.

C. Occupation of deceased from March 1, 1894, to date of death? C. Traveling salesman.

D. Occupation of deceased since certificate was issued? D. Traveling salesman.

61 5. Place and date of birth of deceased? New York city. Apr. 25, 1862.

6. Place and date of death? Buffalo, N. Y., Sept. 29, 1900.

7. A. What was the disease during last illness? A. Heart trouble, I suppose, as that was the only trouble he had.

B. What was the immediate cause of death? B. Don't know.

8. When did health of deceased first begin to be affected? 1 year and 3 weeks prior to death.

9. Duration of last illness? Give full particulars in relation thereto. Over one year.

10. Had the deceased any previous disease, and if so when and what was the nature and duration of same? No.

11. Give the date, as near as possible, when health of deceased first became impaired? Over one year.

12. Name and residence of every physician who attended or prescribed for deceased within three years prior to the date of death? Dr. Levinsky, 116th St.

13. Was an inquest held? If so, furnish herewith copies of the evidence and finding. No.

14. Was death caused by suicide or violence, or from other than natural causes? Don't know.

15. Was deceased engaged in any way in the sale or manufacture of alcoholic liquors? No.

16. Had deceased any other insurance on his life? If so, state what companies or societies, and the amount, and date when each was obtained. No.

17. Have any of deceased's relatives been afflicted with or
62 died of insanity, tuberculosis, consumption, or any hereditary disease? State fully. No.

18. Have you known or heard of deceased applying for insurance to any company or association upon which a policy or certificate was not issued? If so, when and what company or association. No.

Signature of beneficiaries: HATTIE MEYER.

Subscribed and sworn to before me this 1st day of December, 1900.

[SEAL.] B. J. BIRNBAUM,
Commissioner of Deeds (*No.* 96), *New York City.*

STATE OF NEW YORK, }
City of New York, } ss:

I, P. J. Scully, city clerk of the city of New York, do hereby certify that B. J. Birnbaum, before whom the annexed deposition was taken, was, at the time of taking the same, a commissioner of deeds for the city of New York, dwelling in said city, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said commissioner, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said city, the 10th day of December, 1900.

[SEAL.] P. J. SCULLY, *Clerk.*

10c. documentary stamp.
"County clerk's certificate."

63 *Certificate of Master of Finance.*

STATE OF NEW YORK, }
County of New York, } ss:

Benjamin Hart, being duly sworn, says that he is the master of finance of Shakespeare Lodge No. 274, located at —— grand domain of —— and that Bro. Emanuel Meyer of said lodge who died on 29th Sept., 1900, was at the time of his death a member in good standing, and that his dues were paid to December, 1900.

[L. S.] BENJAMIN HART,
Master of Finance.

Subscribed and sworn to before me this 28th day of November, 1900.

HERMAN FRANKFORT,
Notary Public, N. Y. Co.

County clerk's certificate.

Certificate of President and Secretary of Section.

This is to certify that Emanuel Meyer, who died on Sept. 29th, 1900, was at the time of his death a member in good standing of section No. 783, Endowment Rank, Knights of Pythias; that he held certificate No. 48,028, for $2,000, and that the beneficiary named therein is the same person who subscribed to the "certificate and claim of beneficiaries" on the reverse hereof.

Witness our hands and the seal of the section at New York, State of New York, this 3rd day of December, 1900.

L. H. ROTHSCHILD, *Act. President.*
JOSEPH ROTHSCHILD, *Secretary.*

64 The by-laws in force at the time of the admission of Emanuel Meyer to membership in the Endowment Rank of the defendant as far as material to the issues in this case are as follows:

ARTICLE XII.

Proof of Death.

SECTION 1. The proof of death shall in all cases be furnished by the beneficiary or beneficiaries on blank forms to be obtained of the board of control, and shall contain affidavits of the attending physician or physicians, the undertaker who officiated, the master of finance as to standing of deceased in the subordinate lodge at time of death, and from such other person or persons as may be required; affidavits to be made before an officer authorized to take affidavits, and such authority must be certified by the clerk of a court of record, or other competent authority, under seal.

SEC. 2. All necessary legal papers required in order to secure the proper payment of benefits must also be furnished by the beneficiary or beneficiaries, and shall be forwarded with the proof of death to the board of control by the secretary of the section.

65 & 66 It is hereby stipulated and agreed that certification of the case on appeal in above entitled action, in accordance with the provisions of section 3301 of the Code of Civil Procedure is hereby waived.

Dated New York, February 14th, 1903.

LAURENCE G. GOODHART,
Attorney for Appellant.
J. LAWRENCE FRIEDMANN,
Attorney for Respondent.

The foregoing case is hereby ordered on file.
New York, February —, 1903.

WILLIAM J. GAYNOR, *J. S. C.*

67 Supreme Court, Appellate Division, Second Judicial Department.

Present: Goodrich, P. J.; Bartlett, Woodward, Hirschberg and Hooker, JJ.

(Same title.)

Appeal from a judgment entered upon the verdict of a jury in favor of the plaintiffs at Queens trial term and from an order denying the defendant's motion for a new trial.

Laurence G. Goodhart for the appellant.
Otto H. Droege (J. Lawrence Friedmann with him on the brief), for the respondent.

GOODRICH, *P. J.:*

The plaintiff being the beneficiary named in a membership certificate issued upon the application of her husband, Emanuel Meyer, by the defendant, a fraternal mutual benefit corporation, sues for the amount of insurance on the life of her husband specified in the certificate. The defence was that Meyer had committed suicide, which by the terms of the certificate renders it null and void.

When the case came on for trial before Mr. Justice Gaynor and a jury, the defendant claimed and obtained the affirmative of the issue and introduced its evidence, and the plaintiff introduced evidence in rebuttal. At the close of the whole evidence, the defendant moved for a dismissal of the complaint, "upon the ground that the plaintiff had not shown compliance with the terms of the con-
68 tract by showing that she had put in proper and complete proofs of death, as provided by the by-laws and the contract." The court properly denied the motion on the ground that the defendant, at the opening of the case, had "claimed the affirmative and admitted that all the conditions precedent had been complied with, therefore the plaintiff did not need to put in any such proof." The court submitted to the jury for special verdict the question: Did Emanuel Meyer, the husband of the plaintiff, commit suicide? And the jury having answered the question, No, the court directed judgment for the amount of the policy, and the jury found a verdict accordingly. The defendant moved to set aside the verdict; the motion was denied and the defendant excepted and appeals.

The only question which we are required to consider is the exception to a refusal to admit the testimony of three physicians, who attended Meyer, as to declarations concerning the cause of his death made by him in their presence. The plaintiff's counsel objected to

their admission on the ground that such testimony was incompetent and improper and also privileged, that any knowledge obtained by the witnesses was obtained by them while they were acting as physicians for the deceased and was not admissible unless expressly waived at the trial. Plaintiff's counsel stated that the plaintiff did not waive any of the privileges given by sections 834 and 836 of the Code of Civil Procedure. The court excluded the testimony and the defendant excepted. It also excepted to so much of the charge as stated that the physicians' testimony is excluded on the ground that they attended the deceased professionally.

Dr. Bruso, one of these physicians, was summoned to the Iroquois hotel, Buffalo, about seven o'clock in the morning to attend Meyer, who was lying in bed in one of the rooms of the hotel.

69 When the defendant's counsel offered to read certain portions of the deposition of Dr. Bruso, taken *de bene*, which disclosed information as to the condition of the patient, plaintiff's counsel objected and the court asked "Did this doctor treat him?" to which defendant's counsel answered, "He inserted something hypodermically into the man against his wish, which did not help him, I presume." Thereupon the court excluded the evidence and also the other parts of the deposition, and defendant's counsel excepted. The excluded part of the deposition would have tended to show that Meyer had voluntarily taken a corrosive poison known as "Rough on rats," with suicidal intent Meyer was afterward taken from the hotel to the Buffalo General hospital, where he died. Upon arrival at the hospital he was, by order of Dr. McCarthy, house physician of the hospital, put into a private room where the doctor examined and treated him. Dr. McCarthy, who was examined on deposition *de bene*, was asked to state his diagnosis of the case and the details of Meyer's condition, and, objection being made, the testimony was excluded and the defendant excepted.

Dr. Thornton, junior surgeon of the hospital, assisted Dr. McCarthy in the examination and treatment of Meyer. He also was examined on deposition as to his examination of Meyer and the condition in which they found him. The entire deposition was excluded and the defendant excepted.

These several exceptions distinctly raise the question whether sections 834 and 836 relate to cases where physicians professionally attend a patient who does not voluntarily require their serv-

70 ices. There is no evidence that Meyer employed any one of these physicians, but it is none the less true that they attended him in no other than a professional capacity. Section 834 forbids any physician "to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The language is broad enough to cover cases of medical attendance, whether such attendance results from the voluntary call of the patient upon a physician or from the exigencies of the patient's situation. If the relation is that of a physician attending a patient in a professional

capacity, no matter how the relation was brought about, the sections apply.

Section 836 provides that section 834 applies to any examination of the physician "unless the provisions thereof are expressly waived upon the trial or examination * * * by the patient. * * * But a physician * * * may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient." The record shows that the plaintiff did not waive the privilege either on the trial or examination of any of the physicians; and even where the personal representatives waive the privilege, the physician is forbidden to disclose any fact which would tend to disgrace the memory of the patient. It can hardly be said that a declaration of Meyer that he had attempted suicide would not tend to disgrace his memory.

71 The defendant contends that the plaintiff at the trial waived the physician's privilege by offering in evidence Meyer's application for insurance, which contained a waiver of the provisions of sections 834 and 836, but the court of appeals has held the contrary in Holden *v.* Metropolitan Life Ins. Co. (165 N. Y., 13), and thus set at rest a question which has been much litigated.

There was no error in the exclusion of the testimony in question, and the judgment and order should be affirmed.

At a term of the appellate division of the supreme court held in and for the second judicial department at the borough of Brooklyn, on the 24th day of April, 1903.

Order of Affirmance on Appeal from Judgment.

Present: Hon. William W. Goodrich, presiding justice.
" " William Bartlett,
" " John Woodward,
" " Michael H. Hirschberg,
" " Warren B. Hooker, justices.

(Same title.)

The above named The Supreme Lodge, Knights of Pythias, the defendant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Queens on the 28th day of October, 1902, and from an order made by said court denying a motion for a new trial therein, and the said appeal

72 having been submitted by Mr. Lawrence G. Goodhart of counsel for the appellant and by Mr. Otto H. Droege of

counsel for the respondent, due deliberation having been had thereon, and the court having unanimously, decided that the verdict of the jury is supported by the evidence.

It is hereby ordered, and adjudged that the judgment and order so appealed from be, and the same are hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter,

WM. W. GOODRICH, *P. J.*

Judgment.

Supreme Court of the State of New York, Queens County.

(Same title.)

The above named defendant, The Supreme Lodge, Knights of Pythias, having appealed to the appellate division of the supreme court, for the second judicial department, from the judgment entered in the office of the supreme court of the county of Queens, on the 28th day of October, 1902, for the sum of two thousand four hundred forty-two and 03/100 ($2442.03) dollars in favor of Henrietta Meyer, the above-named plaintiff, and from the order denying the motion of the defendant for a new trial, entered in the office of the clerk of the supreme court on the 23d day of October, 1902, and

73 the said appeal having been duly submitted upon the case and exceptions, and the said appellate court having, after due consideration, ordered that the said judgment and order be affirmed, with costs to the respondent, and the costs of the said respondent having been duly adjusted on notice at the sum of one hundred one and 50/100 ($101.50) dollars,

It is, on motion of J. Lawrence Friedmann, attorney for the plaintiff,

Ordered and adjudged that the said judgment and order appealed from be and the same are hereby affirmed, with costs, and that the plaintiff, Henrietta Meyer, recover of the defendant, The Supreme Lodge, Knights of Pythias, the sum of one hundred one and 50/100 ($101.50) dollars, costs and disbursements on appeal, and have execution for the same.

Dated Jamaica, Queens county, 30th day of April, 1903.

JAMES INGRAM, *Clerk.*

Notice of Appeal to the Court of Appeals.

Supreme Court of the State of New York, County of Queens.

(Same title.)

SIRS: Please take notice that the defendant, The Supreme Lodge, Knights of Pythias, hereby appeals to the court of appeals from the order of the appellate division of the supreme court of the State of

New York for the second judicial department made in this
74 action on the 24th day of April, 1903, and entered in the office of the clerk of said court on said day, whereby it was ordered and adjudged that the judgment heretofore and on the 28th day of October, 1902, made and entered in the office of the clerk of the supreme court of the State of New York, county of Queens, and which adjudged that the plaintiff recover from the defendant the sum of $2442.03 damages and costs, and the order made in this action on the 23d day of October, 1902, and entered in the office of the clerk of this court denying the motion of the defendant for a new trial be affirmed, and from the judgment entered in the office of the clerk of this court on the 30th day of April, 1903, affirming said judgment and said order denying the motion of the defendant for a new trial and adjudging that the plaintiff do recover of the defendant the sum of $101.50 costs and from each and every part of said order and said judgment so appealed from.

Dated May 8th, 1903.

Yours, &c.,

LAURENCE G. GOODHART,
Attorney for Defendant-Appellant.

Office and P. O. address, No. 17 Park row, borough of Manhattan, New York city, N. Y.

To J. Lawrence Friedmann, Esq., attorney for plaintiff-respondent, No. 63 Park row, New York city, borough of Manhattan.

To James Ingram, Esq., clerk of the county of Queens.

75 It is hereby stipulated by and between the attorneys for the respective parties hereto that certification of the case on appeal to the court of appeals herein, in accordance with the provisions of § 3301 of the Code of Civil Procedure is hereby waived and that the foregoing contains the entire record herein.

Dated New York, May 13th, 1903.

J. LAWRENCE FRIEDMANN,
Attorney for the Appellant.
LAURENCE G. GOODHART,
Attorney for the Respondent.

The foregoing case is hereby settled and ordered on file.
May 22d, 1903.

J. S. C.

76 STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 15th day of March, in the year of our Lord one thousand nine hundred and four, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, March 16th, 1904.

HENRIETTA MEYER, Respondent,
ag'st
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant.

Be it remembered, that on the 29th day of May, in the year of our Lord one thousand nine hundred and three, The Supreme Lodge, Knights of Pythias, the appellant in this action came here into the court of appeals, by Laurence G. Goodhart, its attorney, and filed in the said court a notice of appeal and return thereto from the order and judgment of the appellate division of the supreme court in and for the second judical department. And Henrietta Meyer, the respondent in said action, afterwards appeared in said court of appeals by J. Lawrence Friedman, her attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed

Whereupon, the said court of appeals having heard this cause argued by Mr. Laurence G. Goodhart of counsel for the appellant and by Mr. Otto Groege of counsel for the respondent, and after due deliberation had thereon, did order and adjud-e that the judgment
of the appellate division of the supreme court appealed from
77 herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid—

And hereupon as well the notice of appeal and return thereto aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *March 16th*, 1904.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal of Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

78 VANN, *J.:*

The deceased was in extremis, incapable of acting or deciding for himself, and from the necessity of the case any one was authorized to call a physician to treat him. Without the knowledge or consent of the dying man Dr. Bruso was called for that purpose and for that purpose alone he attended. He found Mr. Meyer, the deceased, in bed in an upper room of a hotel "suffering intense pain and vomiting." Meyer told him to get out of the room, that he did not want him there, but he did not leave. He remained to treat him as a physician, and in order to treat him intelligently tried to find out what the matter was. He learned from Meyer, partly in answer to questions and partly through voluntary disclosures, that he had taken a preparation of arsenic, known as Rough on rats, "because he wanted to die." From this information, and from observation of the physical symptoms, he decided that Meyer was suffering from arsenical poisoning. Thus informed as to the nature of the disease, he at once administered a remedy and soon followed it by another. The helpless man, without friends to aid or advise, hopeless of life and courting death, objected and tried to curse him away from his bedside. The doctor, loyal to the instincts of his profession, refused to listen to the ravings of the would-be suicide and continued to prescribe in order to relieve suffering and prolong life. Upon the trial he was not allowed to disclose the information acquired under these circumstances, and we are now to determine whether there was enough evidence to warrant the trial judge in deciding, as a preliminary question of fact, that such information was acquired "in attending a patient in a professional capacity," and that it "was necessary to enable him to act in that capacity." (Code Civ. Pro. § 834; Griffiths *v.* Met. St. Ry. Co., 171 N. Y. 106, 111.)

79 The learned doctor was called as a physician; he attended as a physician; he made a diagnosis as a physician and he administered remedies as a physician. In all that he did he acted in a professional capacity. While it is true that in all he did he acted against the will and in spite of the remonstrance of a man whose condition imperatively called for professional treatment, still the meeting was professional in nature, and all that he said or did was strictly in the line of his profession. Was the subject any the less "a patient" within the meaning and object of the statute, be-

cause he was forced to submit to ministrations designed to save his life? Was the doctor guilty of assault when he gave the hypodermic injection? Was he bound to leave him there to die without an effort to help him? Was the statute designed to protect those only who are treated by consent, but not those treated through necessity? Does it not mean by "a patient" at least one who is consciously treated by a physician even without his consent, when the facts tend to show that through bodily suffering his mind had partially lost its hold? Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and if he remains and relieves him by his physical touch, hold him guilty of assault? Either Dr. Bruso was the physician of Mr. Meyer or he committed an assault upon him and was guilty of a crime. If the wife of the deceased had called the doctor she would have acted as an agent by implied authority; the bell boy who in fact called him also acted upon implied authority, and when the doctor came the act of the agent in calling him, if subject to revocation in the actual case, would have been in the supposed case. While the doctor in either case could have retired, if he remained in either he remained as a physician, the sick man became his patient and he was acting in a professional capacity when, as a duly licensed physician, he actually treated Meyer as a patient—when one who is sick unto death is in fact treated by a physician as a patient even against his will, he becomes the patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived, the existence of the professional relation could not be questioned. The relation of physician and patient, so far as the statute under consideration is concerned, springs from the fact of professional treatment, independent of the causes which led to such treatment. An examination made in order to prescribe establishes the same relation. I am of opinion that Dr. Bruso, who treated the deceased at the hotel, occupied the same confidential relation to him as did the physicians at the hospital. The fact that the patient told the doctor several times to let him alone as he wished to die, expressing himself in a brutal and profane manner, does not, in my judgment, negative the existence of the relation of physician and patient. As was said by Judge Earl in Renihan *v.* Dennin (103 N. Y. 573, 578): "Dr. Bontecou was a person duly authorized to practice physic. Whatever information he had about the condition of the testator he acquired while attending him as a patient. It is true that the testator did not call him or procure his attendance, but he did not t-rust himself into his presence or intrude there. He was called by the attending physician and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient or even by strangers about him, and the statute would be robbed of much of its virtue if a physician thus called were to be

excluded from its provisions because * * * he was not employed by the patient nor a contract relation created between him and the patient. To bring the case within the statute it is sufficient that the person attended as a physician upon the patient and obtained his information in that capacity." So in People *v.* Murphy (101 N. Y. 126) it was held that the fact that the physician was selected and sent by the district attorney to attend the patient, after the commission of a crime against her person, did not affect
81 the question.

When a physician is sent by a prosecuting officer to make a report upon the sanity of a prisoner, if he does not treat or prescribe for the subject, the statements of the latter are not protected. (People *v.* Sliney, 137 N. Y. 570); but even though a physician is sent for the sole purpose of examining as to sanity, if he prescribes for the prisoner during the visit, the relation of physician and patient is thereby created and the disclosures made are within the statute. (People *v.* Stout, 3 Parker's Cr. R. 670; Weitz *v.* Mound City Ry. Co., 53 Mo. App. 39; Freel *v.* Market St. Ry. Co., 97 Cal. 40; Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541. See, also, Grossman *v.* Supreme Lodge, 6 N. Y. Supp. 821; Grattan *v.* Metro. Life Ins. Co., 24 Hun., 43; Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185.) The fact of treatment is the decisive test in this case. Meyer was treated by the witness as a physician and answered his questions knowing that he was a physician and that he was about to prescribe for him against his will. As was well said by the learned judges of the appellate division: "The language (of the statute) is broad enough to cover cases of medical attendance, whether such attendance results from the voluntary call of the patient upon the physician or from the exigencies of the patient's situation. If the relation is that of a physician attending a patient in a professional capacity, no matter how the relation was brought about, the sections apply."

In Griffiths *v.* Met. St. Ry. Co. (171 N. Y. 106), relied upon by the appellant, there was no evidence that the physician acted in a professional capacity, or even that the supposed patient knew he was a physician. The doctor in that case testified that at the time he acquired the information he did not "treat him in any sense as a physician;" that his conversation with him did not relate to his physical condition but was confined "to the method of the
82 accident and that whatever he said was entirely distinct from any treatment or visit of a physician, or anything of that sort;" that while he had rendered "first aid" to the plaintiff in a drug store immediately after the accident when no statement was made, "he did not think the plaintiff knew he was the physician who treated him at the drug store and that he did not advise him of the fact until after the plaintiff had given him a statement." Judge Werner, writing for this court, said: "Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion

that the conversation the doctor was about to give had any relation to professional treatment."

I think that the statute impresses absolute secrecy upon all knowledge acquired by a physician in a sickroom that is necessary to enable him to properly treat the sick person, whether the treatment be with or without his consent. While I agree with Judge Gray in his conclusion as to the first question considered by him, I differ as to the last and for the reasons stated vote in favor of affirmance, with costs.

GRAY, J. (dissenting):

The action was brought to recover against the defendant, a fraternal, mutual benefit corporation organized under the acts of Congress of the United States, upon a certificate of membership issued to Emanuel Meyer, by which it promised to pay, upon his death, to his wife, this plaintiff, the sum of $2,000. The defendant alleged, in defense of the action, that the death of Meyer was the result of suicide; which, within the terms of the agreement of the parties, avoided the certificate. Upon the trial of the issues, the defendant, claiming the affirmative and not questioning plaintiff's preliminary proofs to establish a case under the allegations of her complaint, was allowed to begin with its defense and its evidence was directed towards proving that the beneficiary committed suicide by
83 taking poison. The trial judge submitted to the jury the one question, "whether the deceased committed suicide," and upon their answering "No" to the question, he directed judgment to be entered for the plaintiff. That judgment has been affirmed by the appellate division and, upon this appeal, in substance, the general argument of the appellant is that the waiver of the deceased, contained in his application for the insurance certificate, of all provisions of law, then, or thereafter, in force, prohibiting any physician from testifying to any information acquired by attendance upon him, was a part of a contract, which had been validly made in the State of Illinois, and that sections 834 and 836 of the Code of Civil Proceedure of this State, under which such testimony is rendered inadmissible, unless the statutory prohibition is waived upon the trial by the personal representatives of the deceased, are inoperative, as being in violation of the provisions of the Federal Constitution, which prohibits legislation in impairment of contracts. The argument, further, is that as to one of the physicians, called upon to testify for the defense, his testimony, certainly, did not come within the statutory prohibition; inasmuch as the necessary relationship of physician and patient did not exist.

With respect to the first of these questions raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made

his application for the insurance. The certificate, issuing upon the application, appears, from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: "I hereby accept this certificate of membership sub-
84 ject to all the conditions therein contained," and that had the signature of the applicant, followed by the words, "Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P." By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but "to the further conditions and agreements hereinafter named," and the clause containing his acceptance, above quoted, was one of those "further agreements." From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate: namely, to accept it "subject to all the conditions therein contained." The contract was not completed, in the sense that it was binding upon either party to it, until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As a matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him.

The difficulty in this case, which, in my judgment, entitles the defendant to a new trial in the action, is the exclusion of the evidence of Dr. Bruso, called as a witness for the defendant and asked to state a conversation had with Meyer, the deceased. This witness was a physician, having his office in the city of Buffalo, in this State, near to the Iroquois hotel. He testified that, in the early morning, one of the bell boys of the hotel came for him and, upon entering one of the rooms, he found a man in the bed, suffering from pain and vomiting. Objection being made to his evi-
85 dence, which was in the form of a deposition, the court put the question: "Did this doctor treat him." The defendant's counsel replied: "He inserted something hypodermically into the man against his wish." The objection to the testimony was sustained, the defendant excepted and the whole deposition of the witness was excluded, under the previous ruling of the court that sections 834 and 836 of the Code of Civil Procedure applied. From the deposition, thus offered and excluded, it appeared that the witness had a conversation with Meyer, which was narrated, so far as material, as follows: "I asked him what he had been doing and he told me it was none of my damned business, that he didn't want

me in there and he wanted me to get out of there. * * * I looked around the room. * * * I found * * * a box of 'Rough on rats' * * * empty. * * * He told me he had taken it * * * because he wanted to die * * * he didn't want to get well * * * he didn't want me to do anything. * * * I prepared a hypodermic injection * * * and stimulated him, so he would not die in the Hotel Iroquois. * * * When I was going to give him the hypodermic, he said 'You, (cursing him in foul language), keep away from here. Didn't I tell you before to keep away?' I paid no attention to him and gave him the hypodermic." The witness, was, then, asked if he knew what was the cause of the condition of the man and he answered, that it was arsenical poisoning and that the symptoms evidenced it. The deceased was immediately conveyed from the hotel to the hospital; where he died soon afterwards. The evidence of Dr. Bruso was deemed inadmissible under the provisions of section 834 of the Code; which prohibits a physician from disclosing "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The agreement of the insured, contained in his application which waived for himself, his representatives and bene-
86 ficaries, "any and all provisions of law, now or hereafter in-force, prohibiting * * * any physician * * * attending me * * * from disclosing, or testifying to, any information acquired thereby" and which expressly consented to such testimony being given in any suit, was held below to be insufficient to meet the requirement of section 836 of the Code, that the provisions of section 834 must be expressly waived upon the trial by the personal representatives of the deceased patient. Such a waiver was refused at this trial. Our recent decision in Holden *v.* Metropolitan Life Ins. Co., (165 N. Y. 13), justified the ruling below upon the question of the force of the waiver in the insurance contract. Theretofore, it had been the rule to regard such a waiver as a binding part of the contract of insurance and, as such, available to the insurer in any action upon the policy. (Foley *v.* Royal Arcanum, 151 N. Y. 196.)

But was there disclosed that relationship of physician and patient between the deceased and Dr. Bruso, which made operative the prohibitory provisions of section 834? As the inadmissibility of such testimony is, only, because of the statute, it is quite important that the case should come very clearly within its terms; however liberal the construction, which we should give to an enactment intended to promote the ends of justice. The object of this legislation was to render privileged what communications are made between a physician and his patient; but, obviously, it is essential that it shall appear that the person attented is his patient, in the sense in which such a term is ordinarily understood. In Griffiths *v.* Metropolitan Street Railway Company, (171 N. Y. 106), we, quite lately, had occasion to consider such a question under a state of facts, not, essen-

tially, dissimilar to that now before us. In that case the plaintiff brought his action to recover damages for injuries sustained through the negligence of the defendant's servant, a gripman upon
87 one of its cars. The defendant called a physician, as a witness, who was at the scene of the accident, when an ambulance arrived, and who rendered "first aid" to the plaintiff. The witness was, also, an attending physician at the hospital, to which the plaintiff was assisted by him in the ambulance; but he rendered no further services to him while in the hospital. The witness was asked to relate a conversation, which he had with the plaintiff in the hospital, subsequently; but the court sustained an objection to its admissibility under section 834 of the Code and the witness was not allowed to testify to what was said by plaintiff with reference to his sufferings, or to the accident. When the case reached this court, it was held that the exclusion of the physician's evidence was an error; for which the judgment should be reversed and a new trial had. The decision by this court rested upon the ground that the burden upon the plaintiff of showing that the evidence was within the statutory prohibition had not been met and that the facts did not warrant the presumption that the relation of physician and patient existed. The opinion, quite fully, reviewed the cases, illustrating the application of the statutory provision in question, and that the rule was distinctly adhered to that, to warrant the application, it must appear that the relation of physician and patient, at the time, existed and that the information sought to be excluded was necessary to enable the physician to act as such. Previous to the Griffiths case that rule had been expressed in People *v.* Koerner, (154 N. Y. 355).

Can we say that the rule applies to such a situation, as that disclosed in this case, any more than it did in the Griffiths case? I think not. It seems to me to be difficult to assert, with any gravity of countenance, at least, with Meyer rejecting the witness' presence and services, and cursing him for his interference, and with the witness' determined efforts to prevent Meyer from dying in the hotel, whose servants had summoned him, that the relation
88 of physician and patient arose, and that the confidential relation existed, which the statute has in view and which, with a tender solicitude for a patient's interests, it is designed to safeguard.

The inadmissibility of the testimony of the hospital physicians rests upon a different basis. Both may, reasonably, be said to have been in attendance upon his as a hospital patient; but, in my opinion, the deposition of Dr. Bruso was erroneously excluded and, therefore, I advise the reversal of the judgment.

O'Brien, Bartlett and Martin, JJ., concur with Vann, J.; Parker, Ch. J., concurs with Gray, J.; Werner, J., absent. Judgment affirmed.

89 Supreme Court, Kings County.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant.

Please take notice, that the remittitur from the court of appeals herein was this day duly filed in the office of the clerk of Queens *court.*

Dated New York, March 18th, 1904.

J. LAWRENCE FRIEDMANN,
Attorney for Plaintiff, # 25 Broad Street,
Borough of Manhattan, New York City.

To Laurence G. Goodhart, Esq., attorney for defendant, # 13 Park row, New York city.

(Endorsed:) Supreme court, Kings county. Meyer, *vs.* Knights of Pythias,—Notice of filing of remittitur. J. Lawrence Friedmann attorney for plaintiff, # 25 Broad street, New York city. To Laurence G. Goodhart, Esq., attorney for defendant, # 13 Park *Park* row, New York city.—*Copy.*

90 At a special term of the supreme court of the State of New York, held in and for the county of Kings at the county court house of said county, on the 18th day of March, 1904.

Present: Hon. William F. Gaynor, justice.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendant from the judgment of this court to the said court of appeals, and that said appeal has been dismissed by said court, and that the judgment appealed from has been affirmed with costs, and that the record of proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law,

Now, therefore, on motion of J. Lawrence Friedman, Esq., attorney for the plaintiff, it is

Ordered and adjudged, that the judgment of the said court of appeals be, and the same is hereby made the judgment of this court; and that the plaintiff have execution against the defendant for the

costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgments of this court in this cause, entered the 28th day of October, 1902, and the 30th day of April, 1903, and that this order or
91 judgment be annexed to the judgment-roll.

Enter in Queens county:

G.

Granted March 18th, 1904.

EDWARD KAUFMAN, *Clerk.*

(Endorsed:) Please take notice that the within is a true copy of an order herein this day duly entered and filed in the office of the clerk of this court in Queens county.

Dated New York, this 18th day of March, 1904.

Yours, J. LAWRENCE FRIEDMANN,
Attorney for Pl'ff-Resp'd't.

Office & post office address, 61 and 63 Park row, New York city, N. Y.

To Laurence G. Goodhart, attorney for def't-app'l't.

(Further endorsed:) Court of appeals, New York.—Henrietta Meyer, pl'ff-resp'd't, against The Supreme Lodge, Knights of Pythias, def't-app'l't. Order on remittitur.—J. Lawrence Friedmann, attorney for pl'ff-resp'd't. 61 and 63 Park row, World building, New York city, N. Y. To Laurence G. Goodhart, Esq., attorney for def't-app'l't.

92 Supreme Cou[illegible] Kings County.

HENRIETTA MEYER, Plaintiff,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant.

A judgment in this action in favor of the plaintiff and against the defendant having been duly rendered in this court, on the 28th day of October, 1902, upon a verdict of the jury, for the sum of two thousand two hundred and forty-seven and 66/100 ($2247.66) dollars, and also for two hundred and thirteen and 37/100 ($213.37) dollars costs adjusted in said judgment; and the defendant having appealed from said judgment to the appellate division of this court, for the second department; and the said judgment having been affirmed by said appellate division of this court, and judgment of affirmance having been rendered thereon on the 30th day of April, 1903, that the plaintiff recover from the defendant the sum of one hundred and one and 50/100 ($101.50) dollars costs of said appeal; and the defendant having appealed from said judgment of affirmance to the court of appeals; and the said court of appeals having sent hither

its remittitur, filed herein on the 19th day of March, 1904, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of said court of appeals to this court to be enforced according to law; and this court having, by an order entered herein the 18th day of March, 1904, ordered that said judgment be made the judgment of this court, with costs, and the
93 same having been duly adjusted by the clerk of this court at the sum of one hundred twelve and 40/100 ($112.40) dollars,

Now, on motion of J. Lawrence Friedmann, Esq., attorney for the plaintiff, it is

Order- and adjudged, that the judgment of the court of appeals be, and the same is hereby made the judgment of this court; and that the plaintiff have execution against the defendant for the costs adjusted by the clerk of this court, amounting to the sum of one hundred twelve & 40/100 ($112.40) dollars, for which amount the plaintiff hereby has judgment against the said defendant, as well as for the amount adjudged to be recovered in and by the judgments of this court, duly entered on the 28th day of October, 1902, and the 30th day of April, 1903.

Dated Jamaica, Queens county, March 21st, 1904.

D. L. VAN NOSTRAND, *Clerk.*

(The foregoing document contains the following endorsements)

Please take notice that the within is a true copy of a judgment herein this day duly entered and filed in the office of the clerk of this court.

Dated New York, this 21 day of Mar. 1904

Yours, J. LAWRENCE FRIEDMANN,
Attorney for Pl'ff-Resp'd't.

Office & post office addres- 61 and 63 Park row, New York city, N. Y.

To L. G. Goodhart, Esq., attorney for app'l't.

Supreme court, Queens county.—Henrietta Meyer, pl'ff-resp'd't against—Supreme Lodge of the Knights of Pythias, def't-app'l't. Judgment with notice of entry—J. Lawrence Friedman, attorney for resp'd't 61 and 63 Park row, World building, New York city, N. Y.—To Laurence G. Goodhart, Esq., attorney for app'l't.

94 Supreme Court of the United States.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff in Error,
against
HENRIETTA MEYER, Defendant in Error.

Know all men by these presents, that we, The Supreme Lodge, Knights of Pythias, as principal, and National Surety Company, a New York corporation, as surety are held and firmly bound unto Henrietta Meyer, the defendant above named, in the sum of thirty-five hundred dollars, to be paid to said Henrietta Meyer, her executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 2nd day of April, 1904.

Whereas, the above named plaintiff in error, The Supreme Lodge, Knights of Pythias, is about to sue out a writ of error to the United States Supreme Court to reverse the judgment in the above-entitled case by the supreme court of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error, The Supreme Lodge, Knights of Pythias, shall prosecute said writ to effect and answer all costs and damages, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
[SEAL.] By LAURENCE G. GOODHART,
Attorney-in-fact.

95 NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT,
[L. S.] *Res. Vice-President.*

Attest: ARTHUR P. WEST,
Res. Ass't Secretary.

STATE OF NEW YORK, }
County of New York, } ss:

On the 4th day of April in the year 1904, before me personally came Laurence G. Goodhart to me known, who being by me duly sworn did depose and say that he resides in Brooklyn, New York; that he is the attorney-in-fact of the Supreme Lodge, Knights of Pythias, the corporation described in and which executed the above instrument.

NARCISO C. DONATO,
[NOTARIAL SEAL.] *Notary Public, Kings County,*

Certificate filed in New York county.

96 STATE OF NEW YORK, } ss:
County of New York, }

On this 4th day of April, 1904. before me personally appeared Robert M. Nugent, res. vice president of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the county of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Robert M. Nugent further said that he is acquainted with Arthur P. West and knows him to be the res. ass't secretary of said company; that the signature of the said Arthur P. West subscribed to the said instrument is in the genuine handwriting of the said Arthur P. West and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said res. vice president.

[NOTARIAL SEAL.] JAMES FAWKNER,
Notary Public, No. 106, *for Kings County.*

Certificate filed in New York, Queens, Richmond and Westchester counties.

Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1. *Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney in fact, and, except when signed by an attorney in fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretaries and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

STATE OF NEW YORK, } ss:
County of New York, }

I, Arthur P. West res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company this 4th day of April, 1904.

[L. S.]

ARTHTR P. WEST,
Res. Ass't Secretary.

97 [Endorsed:] Supreme Court of the United States. The Supreme Lodge, Knights of Pythias, plaintiff-in-error, against Henrietta Meyer, defendant-in-error. Washington, D. C., April 5th, 1904. I approve of the within bond and of the sufficiency of surety. R. W. Peckham, associate justice of the Supreme Court of the United States. Copy. Original filed in the office of the clerk of Queens county at Jamaica, New York, April 20th, 1904. D. L. Van Nostrand, clerk.

98 UNITED STATES OF AMERICA, ss:

To Henrietta Meyer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York wherein The Supreme Lodge, Knights of Pythias is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand nine hundred and four.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

99 On this ninth day of April, in the year of our Lord one thousand nineh undred and four, personally appeared Laurence G. Goodhart before me, the subscriber, Narciso C. Donato, a notary public, duly commissioned and sworn, dwelling in the city of New York and makes oath that he delivered a true copy of the within citation to J. Lawrence Friedman Esq., attorney of record for said Henrietta Meyer therein named, in the action in the said supreme court of the State of New York.

LAURENCE G. GOODHART.

Sworn to and subscribed the 9th day of April, A. D. 1904.

[Seal of Narciso C. Donato, Notary Public, New York.]

NARCISO C. DONATO,
Notary Public, Kings County.

Certificate filed in New York county.

Service of the within citation is hereby admitted this 9th day of April 1904 at the city, county and State of New York.

J. LAWRENCE FRIEDMANN,
Attorney for Defendant-in-Error.

100 Supreme Court of the United States.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff-in-Error,
against
HENRIETTA MEYER, Defendant-in-Error.

Assignment of Errors.

Afterwards, to wit, on the fourth day of April, A. D., one thousand, nine hundred and four, before the honorable, the Chief Justices of the United States Supreme Court, and the honorable the associate justices thereof, in the Capitol, in the city of Washington, District of Columbia, came the said The Supreme Lodge, Knights of Pythias, by Carlos S. Hardy and Laurence G. Goodhart, its attorneys, and says that by the record of proceedings aforesaid there is manifest error in this, to wit:—

1. The trial court erred in sustaining the objection of the plaintiff, Henrietta Meyer, to the evidence offered by the defendant, The Supreme Lodge, Knights of Pythias, and in excluding and refusing to admit in evidence the answer to the following question put to Arthur McCarthy, M. D., by the defendant:—

"Q. How long did he remain at the hospital?"

2. The trial court erred in sustaining the objection of the plaintiff aforesaid, to the question set forth in the first assignment of error aforesaid on the ground that said question was incompetent and improper, also that it was privileged, that any knowledge
101 obtained by this physician was obtained while he was acting as physician for the decedent, and is not admissible unless expressly waived at the trial, and we (the plaintiff aforesaid) hereby state that we do not waive any of the privileges given to us by sections 834 and 836 of the Code, and hereby object to its admissibility.

3. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the answer to the following question, put to Arthur McCarthy, M. D., by the defendant:—

"Q. Let us have your complete diagnosis of the case at that time?"

4. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the answer to the following question, put to Arthur McCarthy, M. D., by the defendant:—

"Q. Will you give us the details of his condition?"

5. The trial court erred in ruling upon the trial with respect to the testimony of C. Frank Bruso, M. D., as to whom the defendant contended that the relationship of physician and patient did not arise between said witness and Mr. Meyer (the decedent) that

"If he did not treat him and he was not his physician, read it all."

6. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the words "suffering intense pain and vomiting" in the answer of the said witness C. Frank Bruso, M. D., to a question propounded by the defendant aforesaid and which said answer in full is as follows:

102 "I found a man lying in bed there, suffering intense pain and vomiting."

7. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the rest of the deposition of the witness, C. Frank Bruso M. D., set forth in the record and proceedings herein.

8. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the deposition of the witness, William Irving Thornton M. D., set forth in the record of proceedings herein.

9. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the certificate of the physician (William Irving Thornton) attached as an exhibit to the record of proceedings herein.

10. The trial court erred in denying and refusing to grant the motion made by the defendant aforesaid to dismiss the complaint of the plaintiff aforesaid.

11. The trial court erred in charging the jury, against the exception of the defendant aforesaid as follows, to wit:

"I have excluded the evidence of the physicians and surgeons "who attended him, because the law excludes it. When you em- "ploy a doctor he may not come into court and disclose what he "learns in the treatment. It is not permitted. * * * That is "well established in our law"

12. The trial court erred in directing judgment for the plaintiff aforesaid and against the defendant aforesaid, upon the rendition of the verdict of the jury, for the sum of $2,240.66.

13. The trial court erred in denying the motion of the defendant aforesaid to set aside the verdict and for a new trial upon all
103 the grounds specified in § 999 of the Code of Civil Proceedure of the State of New York and in entering the order of the 23rd day of October, 1902, to that effect.

14. The trial court erred in entering the judgment of October 28th, 1902, against the defendant aforesaid and in favor of the plaintiff aforesaid for the sum of $2462.03, and in granting execution to the plaintiff aforesaid against the defendant aforesaid upon the foregoing judgment.

15. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding the opinion of the court, affirming said judgment, as follows, to wit:

"These several exceptions distinctly raise the question whether "sections 834 and 836 relate to cases where physicians professionally "attend a patient who does not voluntarily require their services. "There is no evidence that Meyer employed any one of these physi- "cians, but it is none the less true that they attended him in no other "than a professional capacity. Section 834 forbids any physician "'to disclose any information which he acquired in attending a pa- "'tient, in a professional capacity, and which was necessary to en- "'able him to act in that capacity.' The language is broad enough "to cover cases of medical attendance, whether such attendance re- "sults from the voluntary call of the patient upon a physician or "from the exigencies of the patient's situation. If the relation is "that of a physician attending a patient in a professional capacity, "no matter how the relation was brought about, the sections apply."

16. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding in the opinion of the court, affirming said judgment, as follows, to wit:

"Section 836 provides that section 834 applies to any ex-
104 amination of the physician 'unless the provisions thereof are expressly waived upon the trial or examination * * * by the patient * * * But a physician * * * *But a physician* * * * may upon a trial or examination disclose any information as to the mental or physical condition of a *a* patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient.' The

record shows that the plaintiff did not waive the privilege either on the trial or examination of any of the physicians; and even where the personal representatives waive the privilege, the physician is forbidden to disclose any fact which would tend to disgrace his memory."

17. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellate, The Supreme Lodge, Knights of Pythias, to set aside the aforesaid verdict and for a new trial, erred in holding in the opinion of the court affirming said judgment, as follows, to wit:—

"The defendant contends that the plaintiff at the trial waived the physician's privilege by offering in evidence Meyer's application for insurance, which contained a waiver of the provisions of sections 834 and 836, but the court of appeals has held the contrary in Holden *v.* Metropolitan Life Insurance Co. (165 N. Y. 13), and thus set at rest a question which has been much litigated."

18. The appellate division of the supreme court of the State of New York, in and for the second judicial department, thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding in the opinion of the court, affirming the judgment, as follows, to wit:—

"There was no error in the exclusion of the testimony in question, and the judgment and order should be affirmed."

105 20. The appellate division of the supreme court of the State of New York, in and for the second judicial department upon the appeal aforesaid erred in making and entering its order affirming on appeal said judgment and order so appealed from, which said order of affirmance is dated the 24th day of April, 1903, and contained in the record of proceedings herein.

21. The supreme court of the State of New York in and for the county of Queens, erred in entering its judgment dated the 30th day of April, 1903, affirming the aforesaid judgment and order so appealed from as aforesaid, to said appellate division which said judgment of said 38th day of April, 1903, is contained in the record of proceedings herein.

22. The court of appeals of the State of New York upon the appeal thereto taken from the aforesaid judgments and orders, erred in holding in the opinion of said court, affirming said judgments and orders as follows, to wit:—

"Upon this appeal, in substance, the general argument of the appellant (The Supreme Lodge, Knights of Pythias) is that the waiver of the deceased, contained in his application for the insurance certificate, of all provisions of law, then, or thereafter, in force, prohibiting any physician from testifying to any information acquired by attendance upon him, was a part of a contract, which had been val-

idly made in the State of Illinois, and that sections 834 and 836 of the Code of Civil Proceedure of this State, under which such testimony is rendered inadmissible, unless the statutory prohibition is waived upon the trial by the personal representatives of the deceased, are inoperative, as being in violation of the provisions of the Federal Constitution, which prohibit legislation in impairment of contracts * * * With respect to the first of these questions raised by the appellant, (the one just quoted) whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made his application for the insurance. The certificate issuing upon the application, appears from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant, followed by the words, 'Dated at New York, this 28th day of
106 September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P.' By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter named,' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement endorsed upon the certificate: namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that it was binding upon either party to it until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him."

And the said court further erred in its opinion wherein Mr. Justice Vann says:—

"* * * I agree with Judge Gray in his conclusion as to the first question considered by him."

23. The court of appeals of the State of New York upon the said appeal thereto erred in affirming the judgments so appealed from and the order so appealed from with costs.

24. The court of appeals of the State of New York erred in granting to the plaintiff-respondent, Henrietta Meyer, a remittitur remitting the proceedings in said court to the said supreme court of the State of New York, in and for the county of Queens, in accordance with said opinion for error in which the last error was assigned.

25. The supreme court of the State of New York, in and for the county of Queens, erred in making and entering the order of March 18th, 1904, wherein and whereby it was ordered and adjudged that the aforesaid judgment of the court of appeals be and the same was made the judgment of said the supreme court of the State of New York, in and for the county of Queens.

107 26. The supreme court of the State of New York, in and for the county of Queens, erred in making and entering the judgment of affirmance of March 21st, 1904.

And the said plaintiff-in-error prays that the judgments and orders aforesaid for the errors aforesaid, all of which appear upon the face of said record of proceedings aforesaid, and other errors in the record of proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that a mandate of this honorable court to that effect may issue therein to the said the supreme court of the State of New York, in and for the county of Queens, and that the said plaintiff-in-error may be restored to all things which it has lost by the occasion of said judgments and orders.

CARLOS S. HARDY,
LAURENCE G. GOODHART,
Attorneys for Plaintiff-in-Error.

Office & P. O. address, 17 Park row, borough of Manhattan, New York city, New York.

108 [Endorsed:] The Supreme Court of the United States. The Supreme Lodge, Knights of Pythias plaintiff-in-error, against Henrietta Meyer defendant-in-error. Original. Assignment of errors. Carlos S. Hardy and Laurence G. Goodhart, attorneys for pl'ff-in-error 13–21 Park row, borough of Manhattan, New York, N. Y.

109 [Endorsed:] File No. 19,309. Supreme Court U. S. October term, 1903. Term No. 658. The Supreme Lodge Knights of Pythias, pl'ff in error, *vs.* Henrietta Meyer. Assignment of errors. Filed May 9", 1904.

Endorsed on cover: File No. 19,309. New York supreme court. Term No. 234. The Supreme Lodge, Knights of Pythias, plaintiff in error, *vs.* Henrietta Meyer. Filed April 25th, 1904. File No. 19,309.